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78-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

HON. JULIO CESAR PEREZ, Secretary of the Treasury of the Commonwealth of Puerto Rico, et al
Petitioners,

v.

JUDITH RODRIGUEZ DE QUIÑONEZ, LUIS S. PARRILLA AND ANTERO SOLIS LAZU
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

HECTOR A. COLON CRUZ
Solicitor General

LIRIO BERNAL DE GONZALEZ
Assistant Solicitor General

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Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

TO THE HONORABLE COURT:

Honorable Julio César Pérez, Secretary of the Treasury of Puerto Rico, et al, hereby petition for a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the First Circuit entered on March 30, 1979, and the order denying our Motion for Rehearing of May 7, 1979, which reversed the Judgment of the United States District Court for the District of Puerto Rico.

OPINION BELOW

The Opinion and Judgment of the United States Court of Appeals for the First Circuit (App. I and II) is not reported. The initial Magistrate's Report and Recommendation (App. III) and the Opinion and Order of the United States District Court for the District of Puerto Rico (App. IV) are not reported.

JURISDICTION

The decision of the United States Court of Appeals for the First Circuit was announced on March 30, 1979 (App. I) and Judgment was entered on the same date (App. II). A timely Motion for Rehearing was filed on April 10, 1979 (App. V). Said motion was denied in a Per Curiam Opinion on May 7, 1979 (App. VI) entered on the same date and as yet unreported (App. VII). A Motion for Stay of Mandate was filed in the United States Court of Appeals for the First Circuit on May 15, 1979 (App. VIII) and the United States Court of Appeals for the First Circuit entered an Order dated May 18, 1979 staying mandate pending the filing of a Petition for Writ of Certiorari in the Supreme Court of the United States by June 14, 1979 (App. IX).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Secretary of the Treasury of Puerto Rico, hereinafter, the "Secretary", by virtue of the authority conferred on him by Article 18 (a) of Law number 88 of the Banco Cooperativo de Puerto Rico, hereinafter, the "Bank", approved on June 21, 1966, as amended

(7 L.P.R.A. 768(a)), removed the respondents from their directorship for having performed acts contrary to sound banking practices and for having incurred in omissions or practices that constituted a violation of their fiduciary duties as directors, that resulted in a substantial financial loss to the bank. The United States Court of Appeals for the First Circuit determined that the statute under which the Secretary acted was unconstitutional by failing to provide for the constitutionally required hearing where a liberty interest has been affected.

In this situation, the questions presented are:

1. Whether in reversing the judgment of the United States District Court for the District of Puerto Rico the United States Court of Appeals for the First Circuit erred in the interpretation of the statute under which the Secretary had acted.

2. Whether the United States Court of Appeals for the First Circuit is constitutionally bound to take judicial notice of the statutes of the Commonwealth of Puerto Rico and their subsequent amendments in force, at the time of the supposed violation of the due process clause of the Fourteenth Amendment.

3. Whether the United States Court of Appeals for the First Circuit erred in finding a violation of a liberty interest protected by the due process clause of the Fourteenth Amendment under a statute that does not require stigmatizing grounds for removal.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment of the United States Constitution provides, in part:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law; ..."

Article 18 A of Law 94 of May 31, 1976 (Title 7, Laws of Puerto Rico Annotated, Section 768 (a)) (App. X).

Article 18 A of Law 94 of May 31, 1976, as amended by Law No. 16 of May 5, 1977 (Title 7, Laws of Puerto Rico Annotated, Section 768 (a)) (App. XI).

STATEMENT

The Bank was organized under the terms of Law 88 of June 21, 1966 approved by the Legislature of the Commonwealth of Puerto Rico (7 L.P.R.A., Sec. 751, et seq.).

The purpose of the Bank was to promote the general welfare of the community by the proper channelling of the resources of cooperative enterprises and their members (7 L.P.R.A., Sec. 752).

Given the special nature of this bank, the Legislature of the Commonwealth of Puerto Rico deemed it necessary to provide in section 18 of Law 88 (7 L.P.R.A., Sec. 768), that the Secretary closely monitor the operation of the Bank, making at least one examination of the same each year, including an examination of the actions of the directors. The Legislature further provided in section 19 (7 L.P.R.A., Sec. 769), that if as a result of any such examination the Secretary found evidence that the Bank was not in a sound economic condition or was being managed in such manner that its depositors were in jeopardy of being defrauded, he should assume its direction and management and appoint a receiver. No alternative course of action was provided, nor was the Secretary required therein to provide any type of prior hearing, even though the receivership could "terminate with the total liquidation of the Bank, if so necessary" (7 L.P.R.A., Sec. 769).

The yearly examination of the Bank made by the Secretary pursuant to 7 L.P.R.A. 768, supra, showed a steadily deteriorating situation. Furthermore, the examination showed repeated violations of applicable provisions of law as well as the fact that the Secretary's recommendations to the Board of Directors went unheeded. Faced with the disastrous economic condition of the Bank, the Legislature of Puerto Rico enacted Law No. 94 of May 31, 1976 to amend Law No. 88 of June 21, 1966 (App. X). This law established a new section (7 L.P.R.A., Sec. 768 (a)) to provide the Secretary with an alternative (a less drastic one) to the appointment of a receiver, namely, the removal of directors of the Bank.

Removal was possible if theSecretary determined that three requirements were met: (1) that a director had incurred in any of the statutorily enumerated violations, (2) that the Bank had sustained or would probably sustain financial loss on account of the mentioned statutorily enumerated violations, and (3) that the director's violation was one involving personal dishonesty on the part of the director.

On May 5, 1977 by virtue of Law No. 16, Sec. 768(a) of 7 L.P.R.A. was further amended (App. XI) substi-

tuting "or" for "and" before the third requirements. This amendment made it clear that no charge of dishonesty need be made in order to justify dismissal. In other words, the first two of the above mentioned requirements were sufficient to justify removal of a director.

This conformed even more accurately with the original thrust of the first amendment of the statute, which was to make available to the Secretary a less drastic alternative to the solution of the bank's problems.

Thus, the amendment made personal dishonesty one of several statutorily enumerated violations supporting dismissal. It also allowed the Secretary to substitute directors on grounds other than personal dishonesty, as he would deem convenient to assure a sound and safe management of the Bank.

The third yearly examination made in January of 1977 showed that the Bank had a capital deficiency in excess of three million nine hundred thousand dollars ($3,900,000.00). It was apparent that the Secretary's exhortation had gone unheeded, the Board of Directors had not corrected the deteriorating economic situation nor acted to prevent the continued, repeated violations of applicable provisions of law. The financial condition of the Bank had become untenable and under 7 L.P.R.A., Sec. 769 it was ready for receivership and liquidation. However, in view of the great repercussions such a situation would entail, and taking into account the government's interest in promoting and strengthening the cooperative movement, as well as stabilizing the already undermined condition of the banking industry of the Commonwealth of

Puerto Rico, the Legislature of Puerto Rico acted to prevent the total collapse of the Bank.

By virtue of Law No. 15 of May 5, 1977 the Legislature of Puerto Rico assigned sixty million dollars ($60,000,000.00) to enable the government to purchase "bad loans" (uncollectable or doubtful loans) from the Bank and from the Savings and Labor Bank.

Thus, it was only by virtue of these legislative measures and faced with the responsability of saving the Bank that the Secretary removed respondents and named other directors in lieu thereof.

On May 9, 1977 the Secretary wrote the following letter to respondents:

> "By virtue of the authority vested in me by Article 18A of Act No. 88 of June 21, 1966, as amended, the Law of the Cooperative Bank of Puerto Rico, I hereby remove you from your position as a member of the Board of Directors of the Cooperative Bank of Puerto Rico for having participated in acts that are contrary to sound banking practices and for having participated in omissions or practices constituting a violation of your fiduciary duty as a director, as a result of which the Bank has sustained a substantial financial loss.
>
> This removal shall take effect upon your receipt of this communications".[1] (App. XII)

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[1] It should be noted that this letter is in harmony with Law No. 16 of May 5, 1977 as it amended sec. 768(a) of 7 L.P.R.A. Only two requirements had to be met for removal to occur, namely, a statutorily enumerated violation (unsound banking practices and violation of fiduciary duties) and a substantial financial loss due to these practices.

On June 15, 1977[2] respondents Judith Rodríguez de Quiñonez, Luis S. Parrilla and Antero Solis Lazú filed a complaint in the United States District Court for the District of Puerto Rico against Hon. Julio César Pérez, Secretary of the Treasury of the Commonwealth of Puerto Rico and petitioners Arturo Torregrosa, Aida Perez, Adalberto Ortiz and Carlos Figueroa. The action was brought under 42 U.S.C. 1983 and its jurisdictional counterpart 28 U.S.C. 2201 and 2202.

Breifly, respondents alleged that article 18(a) of Law 94 of May 31, 1976 (7 L.P.R.A. 768(a)) utilized by the Secretary to remove them from their position as members of the Board of Directors of the Bank was null and void and unconstitutional because it allowed that removal as directors occur without prior hearing and without notification of the acts, omissions and unsound practices warranting said removal. It is further alleged that in so dismissing them, petitioner accused and adjudged respondents guilty of violating Commonwealth laws and of being involved in personal dishonesty; that said removal denied them their right to serve on the Board of Directors and constituted punishment without trial; that as a result of their removal they received a stigma of ridicule, embarrassment and dishonor. In short, that their removal had deprived them of their property and liberty in violation of their constitutional right to due process.

[2] It should be borne in mind that respondents filed their original complaint subsequent to the last amendment to the law involved in this action, namely Section 768 (a) of 7 L.P.R.A. of May 5, 1977.

As remedy, respondents requested the Court to declare the statute unconstitutional and their removal null and void; and that they be reinstated to their positions as directors of the Bank and that petitioners be restrained from preventing respondents' participation as such directors.

Respondents in their complaint not only misquoted the letter sent to them by the Secretary by saying that he acted pursuant to Law number 88 of June 21, 1976 when in truth and in fact the Secretary acted only by virtue of Law number 88 of June 21, 1966. Respondents also purportedly avoided any reference to the law as amended, and specifically referred to it as Section 18(a) of Law 94 of May 31st., 1976, an omission that obviously acted on their behalf in deciding an action by virtue of an unexistent statute.

There is no dispute in the fact that the Secretary himself in his letter mentioned the law as amended and even though petitioners always referred to the removal statute as amended, they did not discuss the significance of the last amendment.

The matter was referred to the United States Magistrate for Report and Recommendation. On April 28, 1978, the Hon. Magistrate recommended that the complaint be dismissed on the basis that no property[3] or liberty[4] interests were present. (See App. III)

On June 20, 1978 the District Court entered an Opinion and Order dismissing the complaint on the grounds that no property interest was present since from the record respondents did not earn their liveli-

[3] *Feinburg* v. *Federal Ins. Corp.*, 522 F. 2d 1335 (1975).

[4] *Paul* v. *Davis*, 424 U.S. 693 (1976).

hood from their services as directors, nor did any statute of the Commonwealth create an expectation of deriving any property interest for their position as directors.[5]

The District Court also discussed extensively the liberty right issue and went on to apply the doctrines of *Paul* v. *Davis*, 424 U.S. 693 (1975) and particularly the case of *Mitchell* v. *King*, 537 F.2d 382 (10th Cir. 1976) (App. IV).

On June 23, 1978 respondents filed their notice of appeal.

After briefs were presented and oral argument was heard, the lower court entered an Opinion and Judgment on March 30, 1979. (See App. I) Said court agreed that no property right was present in the case but it did make a finding that there was a sufficient liberty interest to trigger the due process safeguards. The court distinguished the case at bar from *Bishop* v. *Wood*, 426 U.S. 341 (1976) and *Mitchell* v. *King*, supra. The stigma plus test of *Paul* v. *Davis*, supra, was found to have been met because under the unamended removal statute (7 L.P.R.A. sec. 768 (a)) personal dishonesty was statutorily required.

On April 10, 1979 petitioners filed a Motion for Rehearing on the grounds that Law No. 16 of May 5, 1977 (7 L.P.R.A. sec. 768 (a)) and not article 18(a) of Law No. 94 of May 31st. 1976 governed the case at bar. The significance of the difference between the concepts "and" and "or" was established, for the substitution of the word "or" for "and" by Law No. 16 made the act of removal under that statute one that

[5] *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

did not bring into question any of the Director's integrity.

On May 7, 1979 the petition for rehearing was denied (See App. VI) and the Honorable Court of Appeals for the First Circuit determined that even under the amended statute it was a close question whether there was not such a stigma as to give rise to the due process rights. The Court of Appeals instructed the District Court to regard the case as standing on the removal statute prior to its 1977 amendment.

A Motion for Stay of Mandate was filed on May 15, 1979 and granted on May 18, 1979. (See App. VIII and IX).

REASONS FOR GRANTING THE WRIT

1. Whether in reversing the judgment of the United States District Court for the District of Puerto Rico the United States Court of Appeals for the First Circuit erred in the interpretation of the Statute under which the Secretary had acted.

The Secretary in his letter of dismissal specified the reasons for respondents' discharge (See App. XII). The stated reasons were unsound banking practices and violations of their fiduciary duties which resulted in a substantial financial loss to the Bank. The Secretary in his notification of dismissal referred to the removal provisions of the statute as Law No. 88 of June 21, 1966, as amended.

In this jurisdiction as well as in other jurisdictions, it is a rule that when statutes are cited as having been amended, the citations mean to include all the amendments passed up to the time when the statute is quot-

ed. See, R. Elfren Bernier, *Aprobacion e Interpretacion de las Leyes en Puerto Rico,* 254 (1963).

1A *Sutherland Statutory Construction* 134 (4th, ed. 1972) sec. 20.10 states:

> "The 'original act' theory is used in most of the states. It is based upon the rule of construction that a statute which has been amended is to be read in the future as though it were originally enacted in the amended form. Therefore, when amending a statute which has been previously amended, the title of the amendatory act is sufficient if it reasonably identifies the original act. The intervening amendments are treated as incorporated into the original act. However, caution often makes the identification include a reference to the intervening amendments."

Thus, the Secretary correctly read the amended statute not to require him to find personal dishonesty in order to dismiss the directors.

The District Court relied on *Mitchell* v. *King,* supra, as controlling in the case at bar. Evidently, in deciding the case it had in mind the provisions of the amended statute making it clear that no charge of dishonesty need be made in order for dismissal to occur.

Mitchell, supra, was found to be relevant to the case at bar for a number of reasons. The member of the Board of Regents in the case was appointed for a fixed term, he was not compensated for his services as such, and most importantly, the statute under which he was removed had a disjunctive provision whereby personal dishonesty, in *Mitchell* v. *King* "malfeasance", was not required for removal.[6]

[6] In the case at bar respondents were appointed for fixed terms and were not compensated for their services. Under sec. 768 (a) as amended (See App. XI) the statute clearly established that removal is allowed when the directors have performed acts contrary to sound banking practices or have committed or participated in the commission of any act, omission or practice constituting a violation of their fiduciary duties as director of the bank, or when the Secretary determines that the Bank has sustained or will probably sustain financial loss or other prejudice on account of such violations or that such violation is one involving personal dishonesty.

Therefore, the finding of the District Court that personal dishonesty was not a statutorily required ground for removal in this case led them to correctly determine that the stigma plus test in *Paul* v. *Davis,* supra, was not necessarily implicated by a removal under such a statute.

The Circuit Court of Appeals, in footnote three (3), (See App. I page 6) considered that the Secretary's removal of respondents could have been founded on exercises of poor business judgments alone, rather than upon acts of dishonesty. If that had been the case, *Mitchell* v. *King* supra, would have saved the constitutionality of the law, but since the Circuit Court of Appeals misread the Secretary's actions under the statute to be premised on a finding of personal dishonesty, the Court distinguished this case from being controlled by *Mitchell* v. *King*, supra.[7]

2. Whether the United States Court of Appeals for the First Circuit is constitutionally bound to take judicial notice of the statutes of the Commonwealth of Puerto Rico and their subsequent amendments in force at the time of the supposed violation of the due

[7] There is no dispute as to the fact that in the Secretary's letter the statute cited is Law No. 88 of June 21, 1966, as amended..

process clause of the Fourteenth Amendment.

It is a well settled rule of law that generally courts will take judicial notice of the law prevailing within the forum within which they sit, whether said law in question is written or unwritten. *Hoyt* v. *Russell*, 117 U.S. 401 (1886). (See also 29 *Am. Jur. 2d* Sec. 27, p. 63). The only limitation to said judicial recognition of a law of the forum is that it be a public law. *The Delaware*, 161 U.S. 459 (1896).

The legislative acts of the state within the areas of laws reserved to them by the Federal constitution bind the Federal Courts. Federal Courts cannot act in disregard of the state law in the particular jurisdiction on which they sit.

Therefore it follows, that even though the averments of the complaint were true, they cannot be treated as verities if they are in conflict with the statutes. *Nev-Cal Electric Securities Co.* v. *Imperial Irr. Dist.*, 85 F. 2d 886 (9th Cir., 1936); *Gallager* v. *Ford Motor Comp.*, 226 F. 2d 728 (1955).

It is also established that there is no need to allege or prove state law in federal courts, notwithstanding state law which requires special pleading or proof. *American Seating Co.* v. *Zell*, 138 F. 2d 641 (2nd Cir. 1943); *Peterson* v. *Chicago Great Western R. Co.* 3 F.R.D. 346 (Neb. 1943), *Reeves* v. *Schulmeier*, 303 F. 2d 802 (1962).

The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof. *Lamar* v. *Micou*, 114 U.S. 218, 223 (1885). *Lamar* v. *Micou*, supra, has been interpreted to mean that a federal court cannot refuse to apply the law of a state other

than the forum solely on the ground that it was not affirmatively pleaded or proved. (*Jannanga* v. *Nationwide Life Ins. Co.*, 288 F. 2d 169, 171 (1961).

How much more is a federal court bound to take judicial notice of a law of the very forum in which it sits!

Counsel's failure to cite law of which a United States Court must take judicial notice, and which controls the disposition of the case, does not render such law inapplicable or prevent reliance upon it on appeal. *Palkway Baking Comp.* v. *Freihofer Baking Company*, 255 F. 2d 641 (3rd. Cir., 1958); *Lilly* v. *Grand Trunk Western R. Co.*, 317 U.S. 481 (1943); *Schultz* v. *Tecumseh Products*, 310 F. 2d 426 (1962).[8]

All the above mentioned principles are fully applicable in the case at bar. In spite of respondents' faulty averments to the controlling laws—an omission that favored their theory of the case, neither the District nor the Circuit Court can refuse to consider, indeed they are bound to consider, the prevailing law.

The Honorable Circuit Court was definitely misled with regard to the state of the law governing the action.[9] However, when on the Petitioners' motion for Rehearing said Court was presented with the amended law, it went as far as ordering the District Court to regard the case under a law that at the moment of

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[8] Even though the Court expressed that it had no recollection that the amended statute was orally argued, it is evident from the record that it was timely presented in our Motion for Rehearing. (See App.V page 34).

[9] The Secretary's dismissal letter quoted in the pleading (See App. XII) would have warned them of the amendment to the removal provisions.

respondents' removal was totally unexistent in view of the amendment that substantially altered the requirements for dismissal.

With due respect, it is the position of the petitioners that amendment of 1977 (7 LPRA 768 (a)) controls solely the disposition of this case. To disregard the legislative binding acts of the Commonwealth of Puerto Rico because counsel failed to explain the 1977 amendment, an amendment which petitioners had no reason to hide, did not release the lower Court from its duty to take judicial notice thereof.

3. Whether the United States Court of Appeals for the First Circuit erred in finding a violation of a liberty interest protected by the due process clause of the Fourteenth Amendment under a statute that does not require stigmatizing grounds for removal.

In denying the Motion for Rehearing presented by petitioners the United States Court of Appeals for the First Circuit considered that:

> "Even under the amended statute, it is a close question, given the accompanying circumstances, whether there was not such a stigma as to give rise to the due process rights discussed in our opinion". (See App. VI, page 50)

As has been repeatedly stated, the amended statute does not require the finding of personal dishonesty to be made in order to dismiss directors. The Court of Appeals in its opinion had discussed the statute as it read before the amendment and had concluded that the required finding of personal dishonesty of the removal statute itself, was enough to meet the stigma-plus test developed in *Paul* v. *Davis,* supra.

In the case of *Paul* v. *Davis,* supra, the Supreme Court specifically rejected the notion that the infliction by state officials of a "stigma" to one's reputation, without more, would constitute a violation of the Due Process Clause and at page 701 stated:

> ". . . The words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interest that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause . . . , we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments. . . " The Court went on to say at page 711:

> "In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite

different from the 'liberty' or 'property' recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the state may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law, nor has it worked any change in respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law".

The principle stated in *Paul* v. *Davis*, supra, can be summarized into the following rule of thumb: "loss of reputation plus loss of employment" presents a cognizable liberty-property claim under the Due Process Clause.[10]

It is stigmatizing activities by the government connected with a denial of some kind of right or interest granted by the state that gives rise to the liberty

[10] ". . . The Fifth Circuit has capsulized the import of *Paul* v. *Davis* into the following 'stigma-plus' test: 'to establish a liberty interest sufficient to implicate fourteenth amendment safeguards, the individual must be not only stigmatized but also stigmatized in connection with a denial of a right or status previously recognized under state law'. *Dennis* v. *S & S Consolidated Rural High School District*, 577 F. 2d 338, 341 (5th Cir. 1978), quoting *Moore* v. *Otero*, 557 F.2d at 437". (See App. I page 5)

interests safeguarded by the due process right of the Fourteenth Amendment.

A state given right by itself or stigmatizing activities by themselves do not constitute enough of a liberty interest to trigger the due process safeguards.

In other words, if no stigma has been caused by the government then there is only a removal of an individual in compliance with specified procedures that are part of the state creation of a right and under which the individual accepts his state-given right.[11]

If the government activities merely stigmatize the individual without denying him of any state given right, then a defamation suit would be the appropriate remedy.

In the case at bar, factual stigma was not present[12] or statutorily required. Since stigma was not found here, only a mere conditional removal subject to specified procedures was involved.

There was no clear imputation of dishonesty flowing from removal under this statute.

As in *Bishop* v. *Wood*, 426 U.S. 341 (1976) here unsound banking practices or violation of fiduciary duties do not measure up to the stigma required to conjoin with a state given right or status in order that a liberty interest be present.

The unsound banking practices were patently evident in the catastrophic economic condition in which the Banco Cooperativo ailed when some of the Direc-

[11] See *Bishop* v. *Wood*, 426 U.S. 341, 344 n 5 (1976).

[12] The United States District Court so concluded. (See App. IV)

tors were removed. These reasons for dismissal are quite different from those rather subjective, morally charged reasons for dismissal given to the respondents in *Bishop* v. *Wood*, supra.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted, San Juan, Puerto Rico, June 14, 1979.

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APPENDIX

APPENDICES

Appendix

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Appendix I

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 78-1296

JUDITH RODRIGUEZ de QUINONEZ, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

HONORABLE JULIO CESAR PEREZ, ETC., ET AL.,
DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[HON. JOSE V. TOLEDO, *U.S. District Judge*]

Before

ALDRICH, CAMPBELL and BOWNES,

Circuit Judges.

A. J. Amadeo Murga, for appellants.

Lirio Bernal De Gonzalez, Assistant Solicitor General, Department of Justice, with whom *Hector A. Colon Cruz*, Solicitor General, was on brief, for appellees.

March 30, 1979

CAMPBELL, *Circuit Judge.* Plaintiffs, three former directors of Banco Cooperativo de Puerto Rico, bring this suit under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 against the Secretary of the Treasury of Puerto Rico and the directors

appointed to take their places. They contend that their removal as directors by the defendant Secretary deprived them of liberty and property without due process of law, in violation of the fourteenth amendment to the Constitution.

Banco Cooperativo was organized under is subject to the provisions of title 7, chapter 66 of the laws of Puerto Rico. Plaintiffs, three of the bank's twelve-member board of directors, were elected to their positions for a three-year term by the general assembly of the bank's shareholders. Section 768a of chapter 66 authorizes the Secretary of the Treasury of Puerto Rico to suspend or remove directors. It provides,

> "When the Secretary of the Treasury determines there is evidence that any director or officer of the Cooperative Bank of Puerto Rico has violated this chapter, the rules and bylaws promulgated hereunder or a final cease and desist order, or has performed acts contrary to sound banking practices in connection with the Bank, or has participated in them, or has committed or participated in the commission of any act, omission or practice constituting a violation of his fiduciary duties as director or officer of the Bank; and the Secretary determines that the Bank has sustained or will probably sustain a substantial financial loss of other prejudice on account of such violation or practice or failure to carry out his fiduciary responsibilities and that such violation or failure is one involving personal dishonesty on the part of the director or officer, the Secretary of the Treasury may issue a written order suspending or removing him from his position in that Bank."

Acting pursuant thereto, the Secretary removed plaintiffs prior to the expiration of their terms. A fourth director, not a party to this action, was also dismissed; the other five elected directors were not.

Arguing that removal without a prior or subsequent hearing deprived them of liberty and property without due

process, plaintiffs seek a declaration that § 768a is unconstitutional, reinstatement to their positions as directors, damages, and attorneys' fees. Because it determined that no operty" or "liberty" interest within the fourteenth amendment was involved, the district court dismissed the complaint.

Plaintiffs rely on *Feinberg* v. *Federal Deposit Insurance Corp.*, 522 F.2d 1335 (D.C. Cir. 1975) for the proposition that a directorship may be a property interest within the meaning of the fourteenth amendment. In that case, however, the plaintiff, who was president as well as director of a bank, was receiving a substantial salary, and it was the salary that the court specifically termed a a"property" interest. *Id.* at 1340. In contrast, plaintiffs here do not receive a salary; a salary as such is forbidden by bank regulations although a "fixed sum" is allowed to be set to compensate for attendance at meetings, and directors may be compensated for outside services to the Board.[1] Plaintiffs' sole monetary receipts for serving as directors were $25 for each day's attendance at board meetings plus travelling expenses. The magistrate characterized this $25 per diem as a reimbarsement for expenses and the district court accepted the magistrate's findings and determined that as there was no expectation of deriving any property interest from the position of director, no property interest within the meaning of the fourteenth amendment was involved. On this record, which fails to establish that a directorship of this nature carries with it collateral benefits

[1] Regulation 10.08G of the Banco Cooperativo states:

> "None of the Directors have as such a right to salary but the Board can from time to time set a fixed sum as compensation for the attendance of Board meeting or meetings of any authorized committee. The Board can also authorize payment for compensation which it considers reasonable for any and all of its members for services rendered to the Board that are not for assistance to the meetings of the Board of Directors or such committees."

capable of economic valuation, we uphold this determination.

There remains the question whether plaintiffs have a liberty interest in serving as directors which is protected by the fourteenth amendment. Apart from fundamental rights and rights guaranteed dy one of he provisions of the Bill of Rights which has been incorporated into the fourteenth amendment (which is not involved here), interests comprehended within the meaning of fourteenth amendment liberty or property attain their constitutional status by virtue of the fact that they have been initially recognized and protected by state law, *Paul* v. *Davis*, 424 U.S. 693, 710 (1976), and the dimensions of these interests are shaped by state law. *Bishop* v. *Wood*, 426 U.S. 341 (1976). Arguably, plaintiffs are in a position somewhat similar to that of the plaintiff in *Bishop* v. *Wood*, who claimed that a city ordinance conferred upon him a sufficient expectancy of continued employment to constitute a protected property interest. The ordinance provided: "If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager." *Id.* at 344 n.5. The Supreme Court, noting that plaintiff's interpretation of the ordinance was a possible one, stated it could also be read as "merely conditioning an employee's removal on compliance with certain specified procedures," *Id.* at 345, and deferred to the district court's interpretation to theatter effect. Thus, the ordinance in *Bishop* v. *Wood*, while setting forth conditions for termination, committed the determination of the existence of those conditions solely to the City Manager. *See also Moore* v. *Otero*, 557 F.2d 435, 437 n.6 (5th Cir. 1977) (department's operating procedure which set forth the conditions upon which police corporals are appointed and retained did not confer a property interest but merely informed the chief of police's discretion). Section 768a may be open to an interpretation, in line with

that given the ordinance in *Bishop* v. *Wood*, negating the existence of any fourteenth amendment interest in serving as a director, although three factors not present in *Bishop* v. *Wood*—the existence of a specific term (three years), the exceptional grounds for removal (dishonesty), and the fact that the appointing authority (the shareholders) differs from the removing authority (the Secretary)—point against such an interpretation. We do not pursue the matter further, however, because wholly apart from whether a directorship itself is an interest protected by the fourteenth amendment, we believe that adding the stigma of a discharge for dishonesty gives rise to such an interest.

While defamation by a governmental official, standing alone, does not work a deprivation of liberty protected by the fourteenth amendment, *Paul* v. *Davis*, 424 U.S. 693 (1976), governmental action altering a right or status previously held under state law "combined with the injury resulting from the defamation, justifie[s] the invocation of procedural safeguards." *Id.* at 765-06. *See also V enietulo* v. *Burke*, No. 78-1305, slip op. (1st Cir. March 30, 1979). The Fifth Circuit has capsulized the import of *Paul* v. *Davis* into the following "stigma-plus" test: "To establish a liberty interest sufficient to implicate fourteenth amendment safeguards, the individual must be not only stigmatized but also stigmatized in connection with a denial of a right or status previously recognized under state law." *Dennis* v. *S & S Consolidated Rural High School District*, 577 F.2d 338, 341 (5th Cir. 1978), *quoting Moore* v. *Otero*, 557 F.2d at 437. We have said that "when a state holds out a right to citizens to engage in an activity on equal terms with others, a state-recognized status exists." *Medina* v. *Rudman*, 545 F.2d 244, 250 (1st Cir. 1976), *cert. denied*, 434 U.S. 891. Here, title 7, chapter 66 of the laws of Puerto Rico sets forth general terms pursuant to which an individual may serve as a director; hence, we think the "plus" of the stigma-plus test is satisfied.

Clearly, furthermore, there was serious "stigma" here. The very act of removal under this statute necessarily brings into question the directors' integrity. The statutory grounds for removal, phrased in the conjunctive, require a determination by the Secretary that "there is evidence . . . that such [statutorily enumerated] violations or failure is one involving personal dishonesty."[2]

It is true that, strictly read, the statute does not require an official determination or charge of dishonesty, but only a finding that there is sufficient "evidence" of dishonesty to warrant invoking the statute. This superfine distinction would have little practical effect, however, in reducing the clear imputation of dishonesty flowing from removal under this statute.[3] We thus think that removal from bank di-

[2] The conjunctive phrasing of § 768a distinguishes it from the disjunctive provision involved in *Mitchell* v. *King*, 537 F.2d 385 (10th Cir. 1976), a case upon which the district court relied. There, removal was allowed "for incompetence, neglect of duty, *or* malfeasance in office." (emphasis supplied). *Id.* at 391.

[3] The Secretary sent the following notification of removal to plaintiffs.

> "Pursuant to the authority conferred upon me by Article 18A of the Law No. 88, enacted June 21, 1976, as amended, Law of the Banco Cooperativo de Puerto Rico, [7 L.P.R.A. § 768a] I hereby remove you from the position of member of the Board of Directors of the Banco Cooperativo de Puerto Rico for having participated in acts contrary to sound banking practices and having incurred in omissions or practices that constitute a violation of your fiduciary duties as directors that has had as result that the Bank has suffered a substantial financial loss."

Arguably, these allegations could be founded on exercises of poor business judgment rather than upon acts of dishonesty. As there is no indication in the record that this letter was published, we need not decide whether these charges alone could form the basis for a claim that plaintiffs' "good name, reputation, honor, or integrity" have been impaired. *Bishop* v. *Wood*, 426 U.S. 341, 348 (1976).

rector status, as it is recognized by Puerto Rico law, on the ground of dishonesty, actual or suspected, affects a liberty interest requiring due process safeguards.

We turn next to the question of what process was due. We disagree with plaintiffs' contention that a pre-termination hearing was constitutionally required. There is particular justification for summary action in the banking field. In *Fahey* v. *Mallonee*, 332 U.S. 245 (1947), a regulation authorizing the Federal Home Loan Bank Board, without prior hearing, to appoint a conservator to take possession of a bank's assets was challenged. The Supreme Court upheld the regulation stating that "the delicate nature of the [banking] institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner." *Id.* at 258. Similar reasons pertain to the removal of a director under the conditions set forth in

Plaintiffs also claim they were stigmatized by the Governor's speech televised approximately one week before their removal. Apart from the question whether there exists a sufficient nexus between the speech and plaintiffs' termination to remove it from the realm of simple governmental defamation which is not actionable under 42 U.S.C. § 1983, *Paul* v. *Davis*, 424 U.S. 693 (1976) (*but see Owen* v. *City of Independence*, 560 F.2d 925 (8th Cir. 1977), *vacated on other grounds*, ___U.S.___, 57 L.Ed.2d 1145 (absence of nexus between stigmatizing remark by one official and discharge by second official)), the speech does not stigmatize plaintiffs because it does not identify them as responsible for what the Government termed the "serious economic situation confronting the Banco Obrero and the Banco de Cooperativas." The speech refers to the "deep professional unconcern," "irresponsibility," and "immorality that has surrounded the handling" of bank funds. Blame is placed, at one point or another, on "the forces that rule a country"; the ruling class "composed of a self-serving group of individuals"; individuals with close ties to officials, directors or persons in high government spheres; and one person who treated the Banco Cooperativas as "'his bank' in the selfish and immoral sense of the phrase." Plaintiffs are neither named nor identified.

§ 768a. Requiring retention of plaintiffs as directors pending a hearing would severely hamper, if not curtail, the Commonwealth's ability to deal with a perceived economic crisis. We have affirmed the denial of a pre-termination hearing under circumstances where the intrasion into governmental functioning, while substantial, was much less obstructive than it would have been here. *Levesque* v. *Maine,* 587 F.2d 78 (1st Cir. 1978).

While, therefore, a pre-termination hearing was not required, opportunity for a post-termination hearing affording plaintiffs an opportunity to clear their names was required. Section 768a is unconstitutional insofar as it is construed to empower the Secretary to remove elected directors on the stigmatizing ground set forth without affording them notice of the charges against them and a reasonably prompt post-termination hearing.

We turn next to the question of relief. As their primary remedy, plaintiffs seek reinstatement to their positions as directors; in the alternative they ask for damages. We need not decide whether or not directors removed pursuant to § 768a would ever be entitled to reinstatement as that remedy is not now appropriate. The terms to which plaintiffs were elected by the shareholders have long since expired, and other elected directors are now serving. It would be an unwarranted interference with the bank's internal affairs to order plaintiffs' reinstatement.

Neither party has briefed or argued the issue of damages, and at this stage we cannot determine whether or not plaintiffs are entitled to more than nominal damages *Perez* v. *Rodriguez Bou,* 575 F.2d 21 (1st Cir. 1978). We therefore remand this issue to the district court but with several observations. The significant due process violation which occurred here was not the removal itself but the failure to accord plaintiffs a more detailed notification of charges and a reasonably prompt post-termination hearing at which to clear their names. Hence, "the remedy man-

dated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge'" of dishonesty. *Codd* v. *Velger,* 429 U.S. 624, 627 (1977) *quoting Roth* v. *Board of Regents,* 408 U.S. 564, 573 (1972). *See also Cox* v. *Northern Virginia Transportation Commission,* 551 F.2d 555, 559 (4th Cir. 1976) (compensatory damages for injury to reputation denied). The record does not indicate whether or not plaintiffs ever requested a post-termination hearing, and plaintiffs do not ask for one now. It is very questionable whether plaintiffs may elect to bypass this primary remedy, assuming the Commonwealth is now willing to grant a hearing, and collect damages in the alternative. If, however, the district court determines that due to the Commonwealth's continued refusal, lapse of time, or other reason not due to plaintiffs' volition, a hearing now would be impossible or ineffectual, damages may be proper. In that event, however, the court must carefully ascertain whether any damage to plaintiffs' reputations stemmed from the failure to accord plaintiffs a hearing.

In the absence of proof of injury[4] resulting from the procedural due process violation, damages other than nom-

[4] On the present record it is not clear to what extent, if any, plaintiffs have suffered any injury flowing from the denial of procedural due process. The magistrate found and the plaintiffs have not disputed that plaintiffs retained the same employment after their removal as prior thereto. The magistrate further found "that [plaintiffs'] standing in the community has remained intact" and that "[t]here was no showing that defendant's action had impaired plaintiffs' ability to earn their chosen profession"; hence, he reasoned plaintiffs had sustained no harm to their reputations. As the district court concluded no liberty interest was at stake, it did not pass upon the latter findings. Plaintiffs argue that under Puerto Rico law there is a presumption that damage has been suffered as a result of the Secretary's action. Whether or not plaintiffs' assertion is correct, it does not follow that said damage was caused by the specific denial of procedural due process which occurred here—the absence of a reasonably prompt post termination hearing at which plaintiffs would have been afforded an opportunity to meet the Secretary's charges.

inal damages are generally not appropriate. *Carey* v. *Piphus*, 435 U.S. 247, 260 (1978). Thus, if the alleged tarnish of plaintiffs' reputations would have occurred even had plaintiffs been afforded an appropriate hearing, plaintiffs' reputations have not been damaged by the due process violations.[5] This would be the case, for example, if the Secretary had sufficient evidence of plaintiffs' dishonesty at the time of discharge and if plaintiffs' then available rebuttals would have been ineffectual. We leave final determination of these matters to the district court which will have the benefit of the parties' input on the subject.

The issue of attorneys' fees is also remanded for determination by the district court in accordance with our guidelines set forth in *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, ___ *U.S.* ___, *98 S.Ct. 3146.*

Reversed.

[5] Plaintiffs, however, may still recover for mental and emotional distress actually caused by the denial of procedural due process upon proof thereof. *Carey* v. *Piphus*, 435 U.S. at 263.64. *See also Perez* v. *Rodriguez Bou*, 575 F.2d at 25 (general discussion of the award of substantial compensatory damages for intangible loss of civil rights or purely mental suffering).

Appendix II

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 78-1296.

JUDITH RODRIGUEZ de QUINONEZ, ET AL.,
Plaintiffs, Appellants

v.

HONORABLE JULIO CESAR PEREZ, ETC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: March 30, 1979

This cause came on to be heard on appeal from the United States District Court for the District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgement of the District Court is vacated and the cause is remanded for further proceedings consistent with the opinion filed this day.

By the Court:

/s/ DANA H. GALLUP
/s/ Clerk.

Appendix III

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 77-908

JUDITH RODRIGUEZ QUINONEZ, et al,
Plaintiffs

v.

HONORABLE JULIO CEASAR PEREZ, etc.,
Defendants

MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiffs Judith Rodriguez de Quinonez, Luis S. Parrilla, and Antero Solis Lazu filed the instant complaint on June 15, 1977. The action was brought under Title 42, United States Code, Section 1983, and its jurisdictional counterpart, Title 28, United States Code, Sections 2201 and 2202.

Plaintiffs allege that article 18(A) of Law 94 of May 31, 1976, (7 L.P.R.A. 768 (A)) utilized by the Secretary of the Treasury of the Commonwealth of Puerto Rico to remove them from their position as members of the Board of Directors of the Cooperative Bank of Puerto Rico, is null and void because it enabled their removal as Directors without prior hearing and without notification of the acts, omissions and unsound banking practices warranting said removal; that in so dismissing them, defendant accused and determined that plaintiffs were guilty of violating Commonwealth laws. Said removal has resulted in a stigma of ridicule and dishonor, while depriving them of property and liberty in violation of their constitutional rights to due process.

Defendant has submitted a motion for summary judgment alleging that: 1) the complaint failed to state a claim upon which relief may be granted because the statute in question is constitutional; 2) that the plaintiffs do not have standing to challenge the statute in question on grounds of due process.

We must first bear in mind that the statute in question deals with banking, and that the bank in question is one created under special legislation enacted in furtherance of the Commonwealth's policy of aiding and strengthening cooperative business activity. Thus, an inherent attribute of government is the police power to regulate business activity within the jurisdiction in protection of the public interest and welfare. The Commonwealth of Puerto Rico has exercised its police power in many areas such as zoning restrictions, taxes and duties, professions through licensing, promulgating health and safety standards, and other such regulations concerning economic and social activity. The exercise of the Commonwealth's police power has been valid and constitutional in accordance with the standards laid down by the United States Supreme Court. *North Dakota Pharmacy Board* v. *Synder's Stores,* 414 U.S. 156 (1973); *Ferguson* v. *Skrupa,* 372 U.S. 726 (1962); *Goldblatt* v. *Hempstead,* 369 U.S. 590 (1961).

It is clear that banking is an economic activity which must be strictly regulated if governmental economic policy is to be effective. It is an activity which must be carried out in accordance with the public interest. K. C. Davis, in his Administrative Law Treatise, Section 4.04, page 247, states:

> "... *the regulation of banks and other such institutions bonded with a public trust have* never been treated as an ordinary case and rightfully so. The banking business more than any other, *has been subject of the most careful scrutiny of regulatory agencies.* The unique character and tradition of banking often justify the delegation of extremely broad dis-

cretionary powers to state banking commisioners which, if attempted elsewhere, would like by violate due process." (Underlining ours)

As previously mentioned, we are dealing with a bank created to fulfill a public need and which is subject to the banking law as well as to the requirements of the law under which it was organized. The Cooperative Bank was organized under the provisions of Law No. 88 of June 21, 1966, 7 L.P.R.A. 751, et seq. Its purpose is stated in Section 752 and reads as follows:

> "The purpose of the Bank is *to promote the general welfare of the community by the proper canalization of the resources of cooperative enterprises* and their members, in addition to other resources the institution may raise, *in order to meet the credit requirements of the cooperative organizations,* their members, and the community in general; to facilitate the creation of new cooperatives and other enterprises; and to expand and improve those already existing." (Underlining ours)

On the basis of all of the above considerations the power, of the Commonwealth of Puerto Rico to regulate banking institutions in furtherance of the public good and welfare is undeniable.

Given the special nature of the Cooperative Bank, the Legislature of the Commonwealth of Puerto Rico deemed it necessary that the Secretary of Treasury closely monitor the operation of the bank. (Sec. 18 of Law 88, 7 L.P.R.A. 768). It was also provided in Section 19 (7 L.P.R.A. 769) that the Secretary assume direction and management of the bank should the bank's economic condition appear unstable.

Faced with the steadily deteriorating condition of the Bank, the Legislature enacted Law No. 94 of +ay 31, 1966, to amend Law 88 of June 21, 1966. This law established a new section (7 L.P.R.A. 768(A() which allowed the Secretary to remove the directors of the Bank. The statute clearly promotes the general welfare by providing means

whereby the existence and viability of the Bank may be protected.

The statute in question is clearly an exercise of the Commonwealth's police power. The right to be a director of the Cooperative Bank is not a fundamental right found in the Federal Constitution nor one based on an inherently suspect criterion. The standard of review is not the strict scrutiny test but the rationality test established in *McGowan* v. *Maryland,* 366 U.S. 420 (1961), which states that a statute's constitutionality will be upheld if any state of facts can be conceived to uphold it. The present applicability of the rationality test when no fundamental personal rights are involved was established in *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794, 810-814 (1976); *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 51 (1972).

In short, the questioned statute meets the rationality test, enacted to provide the Secretary of the Treasury with an efficient alternative to remedy the Bank's undesirable condition and thus protect the public welfare.

Defendant's second contention is that plaintiffs lack standing to challenge the statute on due process grounds because their constitutional rights to property and liberty were not abridged or violated.

Plaintiffs were directors, not employees of the Bank and did not earn their livelihood from their services as directors. Said positions are of a fiduciary nature, the main factor being the element of trust. Plaintiffs cite *Feinberg* v. *Federal Deposit Insurance Corp.,* 522 F.2d 1335 (1975) to support their argument that they were denied their rights to property and liberty. A thorough reading of *Leinberg* reveals that Leinberg had a substantial annual salary; owned 28% of the stock and managed another 23%, thus making this case distinguishable due to Leinberg's undisputed property right. Plaintiffs in the case at bar only received a compesation of $25.00 per meeting which amounts to a reimbursement of expenses. Their livelihood

is derived from teaching and/or other employment for the Commonwealth. One plaintiff is a retired accountant and the other two plaintiffs retain the same employment as prior to their removal as directors. "Property interests are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564 (1972). It appears quite clear that plaintiffs have no property right in relation to their position as directors under the laws of the Commonwealth or the Federal Constitution. The action taken by the Secretary of the Treasury did not unconstitutionally violate plaintiff's property right.

As to the alleged deprivation of liberty without due process, it is defendant's contention that plaintiffs' constitutional rights to liberty were not violated. Plaintiffs presented no evidence sustaining their allegation ot harm to their reputation, good name and integrity. Their chosen professions and their standing in the community has remained intact. There was no showing that defendant's action had impaired plaintiffs' ability to earn their chosen profession. As stated in *Paul* v. *Davis,* 424 U.S. 693 (1976):

> ". . . The words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interest that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause. . . . We think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth of Fourteenth Amendments. . ."

In any case, should such harm exist, plaintiffs must litigate their claims in the courts of the Commonwealth of Puerto Rico, for redress in this Court under the Civil Rights Act is improper.

THEREFORE, for the reasons previously stated, it is recommended that plaintiffs' complaint be dismissed. Parties have 10 days to oppose to this Magistrate's recommendation.

San Juan, Puerto Rico, April 27, 1978.

JUAN M. PEREZ-GIMENEZ
United States Magistrate

Appendix IV

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 77-908

JUDITH RODRIGUEZ DE QUISONEZ; LUIS S. PARRILLA and ANTERO SOLIS LAZU

Plaintiffs

vs.

HONORABLE JULIO CESAR PEREZ, officially as Secretary of the Treasury of the Commonwealth of Puerto Rico; ARTURO TORREGROSA; AIDA PEREZ; ADALBERTO ORTIZ and CARLOS FIGUEROA

Defendants

OPINION AND ORDER

Plaintiffs herein filed the instant action under Title 42, United States Code, Section 1983 invoking the jurisdiction of this court under Title 28, United States Code, Sections 2201 and 2202.

In the complaint filed herein it is alleged that Article 18A of Law 94 of May 31, 1976 (Title 7, Laws of Puerto Rico, Section 768A) used by the Secretary of the Treasury of the Commonwealth of Puerto Rico to remove them from their position as members of the Board of Directors of the Cooperative Bank of Puerto Rico, is null and void and unconstitutional because it allowed their removal as directors without prior hearing and without notification of the acts, omissions and unsound practices warranting said removal. It is further alleged that in so dismissing them, defendant accused and adjudged plaintiffs guilty of violating Commonwealth laws and of being involved in personal dishonesty; that said removal denied them their right to serve on the Board of Directors and constituted punishment without trial; that as a result of their removal they received a stigma of ridicule, embarrassment and dishonor; and, in short, that their removal had deprived them of their property and liberty in violation of their constitutional right to due process.

As remedy, plaintiffs requested that the Court declare the statute unconstitutional and their removal null and void, and that an injunction be issued reinstating them to their positions as directors of the Cooperative Bank and restraining defendants from preventing plaintiffs' participation as such directors.

The matter was referred to the United States Magistrate for his report and recommendation, and the record reveals that after the filing of a Stipulation of Facts, a hearing was held herein before the Magistrate as to the unstipulated matters. Thereafter, on April 28, 1978, the Honorable Magistrate filed his Report and Recommendation, to which plaintiffs have filed a timely objection. The matter stands thus submitted for our consideration.

In his report and recommendation the Magistrate suggests that the questioned statute is constitutional. This conclusion is based on two main grounds: 1) that said statute is a permissible exercise of the Commonwealth's police power; 2) that plaintiffs' constitutional rights to property and liberty have not been violated.

In their objection plaintiffs accept that the statute here in question is well within the province of the police power of the state. However, they press their claim by stating that even when within the area of the police power of the state to supervise banking institutions, said power is to be subjected to the procedural safeguards of due process.

The constitutional guaranty invoked herein provides that a person shall not be deprived of life, liberty or prop-

erty without due process of law. Thus, in the present case it was necessary to make a preliminary determination as to whether plaintiffs have suffered a deprivation of liberty or property in the constitutional sense.

The Magistrate correctly determined that plaintiffs were not deprived of their property rights. The record reveals, and the Magistrate so found, that plaintiffs did not earn their livelihood from their services or directors. Nor did any statute of the Commonwealth create an expectation of deriving any property interest from their position as directors. Thus, there being no property right at stake, there was no reason to invoke the Due Process Clause. See *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

However, plaintiffs' contention that they were deprived of their liberty rights without due process because their removal as directors subjected them to a loss of reputation, presents a more complex issue.

The Magistrate concluded that plaintiffs failed to sustain their allegations of harm to their reputation, good name and integrity and that their chosen professions and their standing in the community remained intact. In their objections to the Magistrate's report plaintiffs allege that in so removing them as directors of the bank, public imputations were made in regard to a dishonest and illegal conduct on their part, a serious offense, and that they suffered great embarrassment. They contend that there is a presumption that damages have been suffered as a result of the publication and utterance and rely on local case law as to this point.

In *Paul* v. *Davis*, 424 U.S. 693 (1975) the Supreme Court specifically rejected the notion that the infliction by state officials of a "stigma" to one's reputation, without more, would constitute a violation of a federal constitutional

right so as to make the Due Process Clause automatically applicable:

> ". . . The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proportion that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause . . ." Id. at 701.

In their Memorandum before us, plaintiffs cite *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) in support of their contention that the damage to reputation alleged here is cognizable as a liberty interest within the protection of the Due Process Clause. However, in *Paul* v. *Davis*, supra, the Supreme Court specifically rejected said possible interpretation of the *Constantineau* case by stating:

> ". . . As we have said, the Court of Appeals, in reaching a contrary conclusion, relied primarily upon *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971). We think the correct import of that decision, however, must be derived from an examination of the precedents upon which it relied, as well as consideration of the other decisions by this Court, before and after *Constantineau*, which bear upon the relationship between governmental defamation and the guarantees of the Constitution. While not uniform in their treatment of the subject, *we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. . . .*" Id. at pps. 701-702. (Emphasis added).

The aftermath of the holding of the Supreme Court in *Paul* v. *Davis* can be summarized into a phrase or thumb-

rule: "loss of reputation plus loss of employment" present a cognizable liberty-property claim under the appropriate Due Process Clause.

Even in cases when the property right analysis led to a finding that no such property right existed under state law, as when plaintiff had a non-tenured position, when the damage to reputation resulted in failure to rehire, or affected the possibilities of obtaining future employment, then a cognizable interest was found to exist under the Due Process Clause. This rule was adopted by the Seventh Circuit in *Colaizzi* v. *Walker*, 542 F.2d 969 (1976) at 973:

> "*In other words, infliction of a stigma to reputation accompanied by a failure to rehire (or, a fortiori, by a discharge) states a claim for deprivation of liberty without due process within the meaning of the Fourteenth Amendment.* Moreover, this combination of stigma plus failure to rehire/discharge states a claim even if the failure to rehire or discharge of itself deprives the plaintiff of no property interest within the meaning of the Fourteenth Amendment. We reach this conclusion because on the facts of *Roth* itself the Supreme Court found that the plaintiff respondent had no claim of entitlement to or property interest in his job. *Roth*, supra, 408 U.S. at 478, 92 S.Ct. 2701. Since the Court in *Paul* v. *Davis* specifically approved the *Roth* dictum concerning stigma to reputation, *it follows that stigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not necessarily involving deprivation of property as defined in the Fourteenth Amendment) may nevertheless when found in conjunction state a claim under 42 U.S.C. Section 1983 for deprivation of a Fourteenth Amendment liberty interest without due process.*"

See also: *Edelberg* v. *Illinois Racing Board*, 540 F.2d 279 (7 C.A., 1976); *Ryan* v. *Aurora City Board of Education*, 540 F.2d 222 (6 C.A., 1976 at fnt. 2).

In *Stretten* v. *Wadsworth Veterans Hospital*, 537 F.2d 361 (9 C.A., 1976) the Ninth Circuit did not find a liberty interest at stake. Although *Stretten* contains a language

which could lead to a conclusion that when the stigma to reputation is one that implies moral turpitude or dishonesty then a cognizable liberty interest would exist.[1] However, in *Stretten* plaintiff suffered a tangible loss of being dismissed from his employment as a medical resident. Nevertheless, the Court found that Dr. Stretten's liberty interest had not been infringed by a dismissal without hearing because the charges leveled against him were not the kind which were likely to preclude him from practicing medicine. *Id.* at 366. The Fourth Circuit has also adhered to this interpretation of *Paul* v. *Davis*, in the case of *Cox* v. *Northern Virginia Transportation Commission*, 551 F.2d 555 (4th Cir., 1976) at 558.

We find that the case of *Mitchell* v. *King*, 537 F.2d 385 (10th Cir., 1976) is of utmost application to the facts present herein. In *Mitchell* a former member of the Board of Regents of the Museum of New Mexico brought an action against the Governor of New Mexico, contending that by revoking his appointment as a regent of the museum, the Governor had deprived him of rights to property and liberty without due process.

The Court of Appeals for the Tenth Circuit found that Mitchell did not have a property interest as a Regent entitling him to minimum standards of procedural due process before he can be removed as a regent. Like in the present case, the Regents of New Mexico Museum were not compensated for their services as such, nor did the New Mexico statute create any expectation akin to prop-

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[1] At pps. 365-366 the Court stated:

> "... this Court has concluded that Roth's notion of liberty, while imprecise, distinguishes between a stigma of moral turpitude, which infringes the liberty interest, and a charge of incompetence or inability to get along with coworkers which does not. *Gray* v. *Union County Intermediate Educ. Dist.*, 520 F.2d 803 (9th Cir., 1975); *Jablon* v. *Trustees of California State Colleges*, 482 F.2d 997 (9th Cir., 1973)."

erty, because it did not provide for a pre-dismissal hearing. Again, like in Section 768A challenged herein, possible negative implications could result from the regents' removal because the New Mexico statute provided that the Governor could remove the regent without a hearing "for incompetency, neglect of duty or malfeasance in office."

However, the Tenth Circuit refused to find that injury to reputation *alone* constituted a deprivation of a federally protected property or liberty right. See also: *Adams* v. *Walker*, 492 F.2d 1003 (7th Cir., 1974).

We find that in the present case the Magistrate's conclusion that plaintiffs had no property interest at stake is well founded. After such determination, plaintiffs' liberty claim has no merits, in the federal constitutional sense. We must bear in mind that the "liberty" guaranteed by the Due Process Clause of the Fourteenth Amendment is that "to engage in any of the common occupations of life." See *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). In the present case, plaintiffs' liberty to exercise their chosen profession or to earn a livelihood has not been affected.

In the present case, if plaintiffs have a cause of action their remedy is a suit for defamation in the Commonwealth courts. This is consonant with the holding of the Supreme Court in *Paul* v. *Davis* when it stated:

> "Respondent brought this action, however, not in the state courts of Kentucky but in a United States District Court for that state. He asserted not a claim for defamation under the laws of Kentucky, but a claim that he had been deprived of rights secured to him by the Fourteenth Amendment of the United States Constitution. Concededly, if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law . . . But, he contends, since petitioners are respectively an official of the city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment." [Id. at 697-698].

The Court went on to add:

> "It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. In *Bell* v. *Burson*, 402 U.S. 535 (1971), for example, the State by issuing drivers' licenses recognized in its citizens a right to operate a vehicle on the highways of the State. The Court held that the State could not withdraw this right without giving petitioner due process. In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), the State afforded parolees the right to remain at liberty as long as the conditions of their parole were not violated. Before the State could alter the status of a parolee because of alleged violations of these conditions we held that the Fourteenth Amendment's guarantee of due process of law required certain procedural safeguards.
>
> In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. *But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of*

damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.

Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. *That being the case, petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any "liberty" or "property" interests protected by the Due Process Clause." [Id. at pps. 710-712, Emphasis added].*

Wherefore, in view of all the above, the recommendations of the United States Magistrate are hereby adopted. The complaint filed in the instant case shall be dismissed. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, June 20, 1978.

JOSE V. TOLEDO
Chief U.S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 77-908

JUDITH RODRIGUEZ DE QUINONEZ; LUIS S. PARRILLA and ANTERO SOLIS LAZU
Plaintiffs

vs.

HONORABLE JULIO CESAR PEREZ, officially as Secretary of the Treasury of the Commonwealth of Puerto Rico; ARTURO TORREGROSA; AIDA PEREZ; ADALBERTO ORTIZ and CARLOS FIGUEROA
Defendants

JUDGMENT

The Court having entered an Opinion and Order through Honorable Jose V. Toledo dismissing this complaint

It is ORDERED AND ADJUDGED that the complaint be dismissed.

IT IS SO ORDERED.

San Juan, Puerto Rico, June 22, 1978.

RAMON A. ALFARO
Clerk of the court

Appendix V

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1296

JUDITH RODRIGUEZ DE QUINONEZ, LUIS S. PARRILLA and ANTERO SOLIS LAZU
Plaintiffs-Appellants

v.

HONORABLE JULIO CESAR PEREZ, officially as Secretary of the Treasury of the Commonwealth of Puerto Rico; ARTURO TORREGROSA; AIDA PEREZ; ADALBERTO ORTIZ and CARLOS FIGUEROA
Defendants-Appellees

On Appeal From A Judgment Of The United States District Court For The District Of Puerto Rico

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Petition For Rehearing Of Defendants-Appellees

HECTOR A. COLON CRUZ
Solicitor General

LIRIO BERNAL DE GONZALEZ
Assistant Solicitor General
Department of Justice
Box 192
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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 78-1296

JUDITH RODRIGUEZ DE QUINONES, LUIS S. PARRILLA and ANTERO SOLIS LAZU
Plaintiffs-Appellants

v.

HONORABLE JULIO CESAR PEREZ, officially as Secretary of the Treasury of the Commonwealth of Puerto Rico; ARTURO TORREGROSA; AIDA PEREZ; ADALBERTO ORTIZ and CARLOS FIGUEROA
Defendants-Appellees

On Appeal From A Judgment Of The United States District Court For The District Of Puerto Rico

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Petition For Rehearing Of Defendants-Appellees

TO THE HONORABLE COURT:

Come now defendants, appellees, through their undersigned attorney and pursuant to Rule 40 of the Rules of Appellate Procedure and Rule 15 of this Honorable Court respectfully aver and pray:

INTRODUCTORY STATEMENTS

This petition for rehearing is based on the fact that the law which governs the case at bar is Law No. 16 of May 5, 1977 (7 LPRA sec. 768 (a)) and not Article 18 (a) of Law 94 of May 31st, 1976.

In neither appellees' nor appellants' briefs is it made clear that an amendment was present and this Honorable Court has decided the issue under Article 18 (a) of Law 94, which was amended by Law #16 of May 5, 1977, without considering the latter.

Appellees inadvertenly cited and added as Addendum Law #14 of May 5, 1977 instead of Law #16 of that same date. Law #14 amended the law creating the Labor Savings and Loan Bank of Puerto Rico and is almost exactly the same as Law #16, herein at issue.

Due to the above, neither party on its brief argued the significant differences between both laws and this Honorable Court was inadvertently led to confusion as to which law governs the case.

GROUNDS FOR THE PETITION FOR REHEARING

I

THE LAW TO BE APPLIED IN THIS CASE IS ARTICLE 18 (a) of LAW 94 ENACTED MAY 31st, 1976, AS AMENDED.

The amendment occurred on May 5, 1977 by virtue of Law No. 16 which reads as follows:

> "When the Secretary of the Treasury determines there is evidence that any director or officer of the Cooperative Bank of Puerto Rico has violated this act, the rules and bylaws promulgated hereunder or a final cease and desist order, or has performed acts contrary to sound banking practices in connection with the Bank, or has participated in them, or has committed or participated in the commission of any act, omission or practice constituting a violation of his fiduciary duties as director or officer of the Bank, or the Secretary determines that the Bank has sustained or will probably sustain a substantial financial loss or other prejudice on account of such violation or practice or failure to carry out his fiduciary responsibilities *or* that such violation or failure is one involving personal dishonesty on the part of the director or officer, the Secretary of the Treasury may issue a written order suspending or removing him from his position in that Bank. The Secretary is hereby empowered to appoint substitute directors for such term that in his opinion and discretion he may deem convenient to assure a sound and safe management of the business of the bank." (See Addendum) (emphasis supplied)

The plaintiffs in this case were dismissed on May 9, 1977 by codefendant appellee Julio Cesar Perez who acted pursuant to the amended law as above cited, that is, the law to be applied in the case at bar. This law is clearly distinguish from the law cited on page two of the Opinion of March 30, 1979, of this Honorable Court, reading as follows:

> "When the Secretary of the Treasury determines there is evidence that any director or officer of the Cooperative Bank of Puerto Rico has violated this chapter, the rules and bylaws promulgated hereunder or a final cease and desist order, or has performed acts contrary to sound banking practices in connection with the Bank, or has participated in them, or has committed or participated in the commission of any act, omission or practice constituting a violation of his fiduciary duties as director or officer of the Bank, and the Secretary determines that the Bank has sustained or will probably sustain a substantial financial loss of other prejudice on account of such violation or practice or failure to carry out his fiduciary responsibilities *and* that such violation or failure is one involving personal dishonesty on the part of the director or officer, the Secretary of the Treasury may issue a written order suspending or removing him from his position in that Bank." (emphasis supplied)

The amendment makes it clear that no charge of dishonesty need be made in order that dismissal of the directors occur.

In this context it is significant to consider the clear difference that is present in the concepts of the words "and", "or". *Sutherland Statutory Construction*, sec. 21.14 Vol. 1A (1972) reads in this respect as follows:

> "Where two or more requirements are provided in a section and it is the legislative intent that all of the requirements must be fulfilled in order to comply with the statute the conjunctive 'and' should be used. Where a failure to comply with any requirement imposes liability, the disjunctive 'or' should be used."

II

There Is No Liberty Interest Involved In The Case

A careful reading of the amended law whereby the word "and" is substituted by "or" leads us to conclude that the act of removal under this statute did not bring into question any of the Directors integrity.[1]

Yet, is must again be emphasized that sec. 768 (a) had been amended when Julio Cesar Perez dismissed plaintiffs. The amendment makes it clear that no charge of dishonesty need be made in order that dismissal be warranted.

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[1] This Honorable Court however, acting under the law before its amendment, as cited by the defendants decided in its Opinion of March 30, 1979 that:

> ". . . removal from bank directors status, as it is recognized by Puerto Rico law, on the ground of dishonesty, actual or suspected, affects a liberty interest requiring due process safeguards."

This Court also considered that:

> ". . . The statutory grounds for removal, phrased in the conjunctive, require a determination by the Secretary that 'there is evidence . . . that such [statutorily enumerated] violations or failure is one involving personal dishonesty' ".

As a matter of fact this Honorable Court determined that the letter sent to plaintiff by itself alone need not form the basis for a claim that plaintiffs "good name, reputation, honor or integrity" had been impaired and made it clear that it was in the statute itself that an imputation of dishonesty was present.

We must bear in mind that the amended law leaves no doubt as to the fact that dishonesty need not be present for dismissal to occur. Yet, that is precisely what led this Honorable, Court, under the law before being amended, to intepret that stigma was present. But we must respectfully argue that since no stigma is statutorily recognized in the cited amended law, the thumb-rule of *Paul* v. *Davis*, 424 U.S. 693 (1975) "loss of employment" is not present, and thus no cognizable liberty-property claim under the Due Process Clause is present.

III

The Case Of Mitchell v. King Is Fully Applicable In The Case At Bar

In *Mitchell*[2] a former member of the Board of Regents of the Museum of New Mexico brought an action against the Governor of New Mexico, for revoking his appointment as a Regent of the Museum, alleging that the Governor had deprived him of rights to property and liberty without due process.

The Court of Appeals for the Tenth Circuit found that Mitchell did not have a property interest as a Regent entitling him to minimum standards of procedural due process before he could be removed as a regent. It must be observed that the members of the Board of Regents of New Mexico Museum were not compensated for their services as such, nor did the New Mexico statute create any

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[2] 537 F. 2d 385 (1976)

expectation akin to property, because it did not provide for a pre-dismissal hearing. Again, as in the present case, possible negative implications could result provided that the Governor could remove the regent without a hearing "for incompetency, neglect of duty or malfeasance in office."

However, the Tenth Circuit refused to find that injury to reputation *alone* constituted a deprivation of a federally protected property or liberty right. Citing the case of *Paul* v. *Davis*, supra, the Court said:

> "... The Court in Davis, supra, observed—and quite pertinently in relation to the case at bar—that the governmental action complained of must deprive the petitioner of a right which has its genesis in state law, and the protective shield of §1983 extends only to those interests which attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state laws, and we have repeatedly ruled that procedural guarantees of the Fourteenth Amendment apply whenever state seeks to remove or significantly alter that protected status..."

This Honorable Court distinguishes the case of *Mitchell* v. *King*, supra, from the case at bar precisely in that in *Mitchell* the disjunctive provision made it clear that removal was allowed for incompetence, neglect of duty, or malfeasance in office. The same is true in this case if the right law is applied. Under sec. 768(a) as amended (see Addendum) the statute clearly establishes that removal is allowed when the director has performed acts contrary to sound banking practices, or has committed or participated in the commission of any act, omission or practice constituting a violation of his fiduciary duties as director of the bank, or the Secretary determines that the Bank has sustained or will probably sustain financial loss or other prejudice on account of such violation *or* that such violation is one involving personal dishonesty.

With this in mind, clearly *Mitchell* v. *King*, supra, is applicable. We must again emphasize the great similarity between the case at bar and the *Mitchell* case.

CONCLUSION

Even though no mention of the amended law, applicable in this case, was made either in appellant's or appellees' brief, the same was fully discussed at the hearing of the case held on November 7, 1978 before this Honorable Court.

Therefore, it is respectfully submitted that it is only fair and just that the case be decided pursuant to Law No. 16 of May 5, 1977, that is, the only law governing at the time of dismissal.

At San Juan, Puerto Rico, April 10, 1979

HECTOR A. COLON CRUZ
Solicitor General

LIRIO BERNAL DE GONZALEZ
Assistant Solicitor General

PROOF OF SERVICE

I hereby certify that on this same date two copies of the foregoing Motion have been served by certified mail on A.J. Amadeo Murga, Attorney for Plaintiffs-Appellants, to his address of record, 1105 Banco Popular Center, Hato Rey, Puerto Rico - 00919.

At San Juan, Puerto Rico, April 10, 1979

LIRIO BERNAL DE GONZALEZ
Assistant Solicitor General
Department of Justice
Box 192, San Juan, Puerto Rico - 00902
Phone: (809) 723-5906

ADDENDUM

COMMONWEALTH OF PUERTO RICO

BUREAU OF TRANSLATIONS

SAN JUAN, PUERTO RICO

May 17, 1977

Vicente Corchado Colon, Director of the Bureau of Translations of the Legislature of Puerto Rico, hereby certifies to the Secretary of State that he has duly compared the English and Spanish texts of Act No. 16 (S. B. 375) of the First Session of the 8th Legislature of the Commonwealth of Puerto Rico, entitled:

> AN ACT to amend Section 18A and Section 19 of Act No. 88, approved June 21, 1966, as amended, "Co-operative Bank Act of Puerto Rico",

and finds the same are full, true and correct versions of each other.

Vicente Corchado Colon
Director, Bureau of Translations

(S. B. 375)

(No. 16)

(Approved May 5, 1977)

AN ACT

To amend Section 18A and Section 19 of Act No. 88, approved June 21, 1966, as amended, "Cooperative Bank Act of Puerto Rico".

BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:

Section 1.- Sections 18A and 19 of Act No. 83, approved June 21, 1966, as amended, are hereby amended to read as follows:

"Section 18A.- Suspension or Removal of Directors or Officers.

When the Secretary of the Treasury determines there is evidence that any director or officer of the Cooperative Bank of Puerto Rico has violated this act, the rules and bylaws promulgated hereunder or a final cease and desist order, or has performed acts contrary to sound banking practices in connection with the Bank, or has participated in them, or has committed or participated in the commission of any act, omission or practice constituting a violation of his fiduciary duties as director or officer of the Bank, or the Secretary determines that the Bank has sustained or will probably sustain a substantial financial loss or other prejudice on account of such violation or practice or failure to carry out his fiduciary responsibilities or that such violation or failure is one involving personal dishonesty on the part of the director or officer, the Secretary of the Treasury may issue a written order suspending or removing him from his Position in that bank. The Secretary is hereby empowered to appoint substitute directors for such term that in his opinion and discretion he may deem convenient to assure a sound and safe management of the business of the bank."

"Section 19. If as a result of an examination made of the Bank, the Secretary of the Treasury obtains evidence that the Bank is not in sound economic conditions to continue its business, or that it is being managed 1n such mannner that its depositors are in jeopardy of being defrauded, the Secretary of the Treasury shall assume the direction and management of the Bank and shall Promptly appoint a receiver, which may be the Federal Deposit Insurance Corporation. The receiver thus appointed shall manage the Bank according to the provisions of this act and the applicable regulations.

Said receivership shall terminate with the total liquidation of the Bank, if so necessary, or when the operations thereof, as certified by the receiver, will permit, in the opinion of the Secretary of the Treasury, the return of the Bank's management to its officials and officers, duly elected and appointed under such circumstances as the Secretary of the Treasury may stipulate. The Secretary of the Treasury may fix a reasonable compensation for the services of the receiver and his employees. The determination of the Secretary of the Treasury to appoint a receiver shall be reviewable by the Superior Court. The decision of the Court shall be final and executory, and, once entered, the said Court shall forfeit all jurisdiction over the case. In addition to the aforesaid provisions, the Secretary of the Treasury may opt not to decree the receivership and, in lieu of, to carry out the provisions of Section 18A for the substitution of directors, without prejudice to his opting for the receivership at any time."

Section 2.- This act shall take effect immediately after its approval.

DEPARTMENT OF STATE

I DO HEREBY CERTIFY: That this is a true and correct copy of the original approved and signed by the Governor of the Commonwealth of Puerto Rico on May 5, 1977

As of date: April 5, 1979.

Assistant Secretary of State

Appendix VI

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 78-1296

JUDITH RODRIGUEZ de QUINONEZ et al.,
PLAINTIFFS, APPELLANTS,

v.

HONORABLE JULIO CESAR PEREZ et al.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. JOSE V. TOLEDO, *U.S. District Judge*]

Before

ALDRICH, CAMPBELL AND BOWNES, *Circuit Judges.*

ON PETITION FOR REHEARING

A. J. Amadeo Murga, for appellants.

Lirio Bernal De Gonzalez, Assistant Solicitor General, Department of Justice, with whom *Hector A. Colon Cruz,* Solicitor General, was on brief, for appellees.

May 7, 1979

PER CURIAM. This case was brought, and heard, to determine plaintiffs' rights under 7 L.P.R.A. § 768(a) as established by Article 18(a) of Law No. 94 of May 31, 1976. Thereafter the case was briefed and argued on appeal on

the same basis. Defendants have now filed a petition for rehearing on the ground that, four days before plaintiffs were removed from office, section 768(a) had been amended by Law No. 16 of May 5, 1977. This rewrote the statute, in the disjunctive, instead of in the conjunctive, in a matter that figured in our opinion.

It does not follow that we should grant the petition. Even under the amended statute, it is a close question, given the accompanying circumstances, whether there was not such a stigma as to give rise to the due process rights discussed in our opinion. In any event, we find defendants' failure to call our attention to the amended language inexcusable.

Defendants, by virtue of their official positions, were no strangers to the banking laws. Their counsel was not some fly-by-night, but the Solicitor General of the Commonwealth. After taking the time of a magistrate, a district judge, and a court of appeals, they offer no explanation why they were not familiar with their own statutes; not even an apology. Instead, their petition concludes with the extraordinary statement that "[e]ven though no mention of the amended law, applicable in this case, was made either in appellants' or appellees' brief, the same was fully discussed at the hearing of the case held on November 7, 1978 before this Honorable Court."

The court has no such recollection. Rather, defendants' counsel presented the court with individual copies of the May, 1976 law, with no indication of any change. Black does not become white with the stroke of a pen. Seldom, if ever, do we grant petitions to rehear matters which were not presented merely because of some counsel's oversight. By the same token, where so elementary an error is committed as the failure to acquaint the court with the text of a controlling amendment, particularly one to which we have no ready access except through the parties, this is not excusable neglect. *Cf. Spound* v. *denied,* 429 U.S. 886.

We find it an intolerable imposition on our time and limited resources to grant a rehearing for the purpose of entertaining arguments addressed to that hitherto undisclosed statute. The case stands on the statute prior to the amendment and the district court is instructed so to regard it.

Petition denied.

Appendix VII

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 78-1296.

JUDITH RODRIGUEZ DE QUINONEZ, ET AL.,
Plaintiffs, Appellants,

v.

HONORABLE JULIO CESAR PEREZ, ETC., ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered May 7, 1979

It is ordered that the petition for rehearing filed on April 11, 1979, be, and the same hereby is, denied.

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Amadeo Nurga and Bernal da Gonzalez.]

Appendix VIII

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 78-1296

JUDITH RODRIGUEZ DE QUINONEZ, ET AL.,
Plaintiffs, Appellants,

v.

HONORABLE JULIO CESAR PREZ, ETC., ET AL.,
Defendants, Appellees

On Appeal from a Judgement of the United States District Court for the District of Puerto Rico

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Motion For Stay Of Mandate Under The Provisions Of Rule 41 Of Appellate Procedure

TO THE HONORABLE COURT:

Come now defendants-appellees and through their undersigned attorneys respectfully aver and pray:

1. That being dissatisfied with both Judgment rendered on March 30, 1979, and Order dated May 7, 1979 denying their Petition for Rehearing,[1] defendants-appellees will file

[1] The Order of May 7, 1979 was received in this Office on April 14, 1979.

a Petition for a Writ of Certiorari under Rules 19 to 23 of the Rules of the Supreme Court of the U.S. and under 28 U.S.C. 1254 (1).

2. That Rule 41 of the Rules of Appellate Procedure states as follows:

> "(a) Date of Issuance.—The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to the costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.
>
> (b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the Court of Appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the madate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

3. As defendants appellees will seek review of the Judgment and Order rendered by this High Court under 28 U.S.C. 1254 (1) through the Writ of Certiorari, they respectfully pray that this Honorable Court retain its mandate, or if already forwarded, order its delivery to the Clerk's Office, for a period of thirty (30) days in which

herein appellees shall file the corresponding writ before the Supreme Court of U.S.

RESPECTFULLY SUBMITTED, this 15th day of May, 1979

HECTOR A. COLON CRUZ
Solicitor General

LIRIO BERNAL DE GONZALEZ
Assistant Solicitor General

PROOF OF SERVICE

I hereby certify that on this same date two copies of the foregoing Motion have been served by certified mail on A. J. Amadeo Murga, Attorney for Plaintiffs-Appellants, to his address of record, 1105, Banco Popular Center, Hato Rey, Puerto Rico, 00919.

San Juan, Puerto Rico, this 15th day of May, 1979

LIRIO BERNAL DE GONZALEZ
Assistant Solicitor General
Department of Justice
Box 192
San Juan, Puerto Rico 00902
(Phone: (809) 723-5906

Appendix IX

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 78-1296.

JUDITH RODRIGUEZ DE QUINEZ ET AL.,
Plaintiffs, Appellants,

v.

HONORABLE JULIO CESAR PEREZ, ETC., ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered May 18, 1979

Upon motion of appellees,

It is ordered that mandate be, and the same hereby is, stayed pending the filing and disposition of a petition for writ of certiorari in the Supreme Court of the United States, the same to be filed by June 14, 1979, and notice of such filing to be filed promptly with the Clerk of this Court.

By the Court:

/s/ Dana H. Gallup
Clerk.

[cc: Messrs. Amadeo Murga and Bernal de Gonzalez.]

Appendix X

§ 768a. Suspension or removal of directors or officers

When the Secretary of the Treasury determines there is evidence that any director or officer of the Cooperative Bank of Puerto Rico has violated this chapter, the rules and bylaws promulgated hereunder or a final cease and desist order, or has performed acts contrary to sound banking practices in connection with the Bank, or has participated in them, or has committed or participated in the commission of any act, omission or practice constituting a violation of his fiduciary duties as director or officer of the Bank, and the Secretary determines that the Bank has sustained or will probably sustain a substantial financial loss or other prejudice on account of such violation or practice or failure to carry out his fiduciary responsibilities and that such violation or failure is one involving personal dishonesty on the part of the director or officer, the Secretary of the Treasury may issue a written order suspending or removing him from his position in that Bank.—June 21, 1966, No. 88, p. 257, § 18A, added May 31, 1976, No. 94, p. 277, § 2, eff. May 31, 1976.

Appendix XI

COMMONWEALTH OF PUERTO RICO

BUREAU OF TRANSLATIONS

May 17, 1977

Vicente Corchado Colon, Director of the Bureau of Translations of the Legislature of Puerto Rico, hereby certifies to the Secretary of State that he has duly compared the English and Spanish texts of Act No. 16 (S. B. 375) of the First Session of the 8th Legislature of the Commonwealth of Puerto Rico, entitled:

AN ACT to amend Section 18A and Section 19 of Act No. 88, approved June 21, 1966, as amended, "Cooperative Bank Act of Puerto Rico",

and finds the same are full, true and correct versions of each other.

Vicente Corchado Colon
Director, Bureau of Translations

(S. B. 375)

(No. 16)

(Approved May 5, 1977)

AN ACT

To amend Section 18A and Section 19 of Act No. 88, approved June 21, 1966, as amended, "Cooperative Bank Act of Puerto Rico".

BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:

Section 1.—Sections 18A and 19 of Act No. 88, approved June 21, 1966, as amended, are hereby amended to read as follows: "Section 18A.—Suspension or Removal of Directors or Officers.

When the Secretary of the Treasury determines there is evidence that any director or officer of the Cooperative Bank of Puerto Rico has violated this act, the rules and bylaws promulgated hereunder or a final cease and desist order, or has performed acts contrary to sound banking practices in connection with the Bank, or has participated in them, or has committed or participated in the commission of any act, omission or practice constituting a violation of his fiduciary duties as director or officer of the Bank, or the Secretary determines that the Bank has sustained or will probably sustain a substantial financial loss or other prejudice on account of such violation or practice or failure to carry out his fiduciary responsibilities or that such violation or failure is one involving personal dishonesty on the part of the director or officer, the Secretary of the Treasury may issue a written order suspending or removing him from his position in that Bank. The Secretary is hereby empowered to appoint substitute directors for such term that in his opinion and discretion he may deem convenient to assure a sound and safe management of the business of the bank."

"Section 19.—If as a result of an examination made of the Bank, the Secretary of the Treasury obtains evidence that the Bank is not in sound economic conditions to continue its business, or that it is being managed in such manner that its depositors are in jeopardy of being defrauded, the Secretary of the Treasury shall assume the direction and management of the Bank and shall promptly appoint a receiver, which may be the Federal Deposit Insurance Corporation. The receiver thus appointed shall manage the Bank according to the provisions of this act and the applicable regulations.

Said receivership shall terminate with the total liquidation of the Bank, if so necessary, or when the operations thereof, as certified by the receiver, will permit, in the opinion of the Secretary of the Treasury, the return of the Bank's management to its officials and officers, duly elected and appointed under such circumstances as the Secretary of the Treasury may stipulate. The Secretary of the Treasury may fix a reasonable compensation for the services of the receiver and his employees. The determination of the Secretary of the Treasury to appoint a receiver shall be reviewable by the Superior Court. The decision of the Court shall be final and executory, and, once entered, the said Court shall forfeit all jurisdiction over the case. In addition to the aforesaid Provisions, the Secretary of the Treasury may opt not to decree the receivership and, in lieu of, to carry out the provisions of Section 18A for the substitution of directors, without prejudice to his opting for the receivership at any time." Section 2.—This act shall take effect immediately after its approval.

DEPARTMENT OF STATE

I DO HEREBY CERTIFY: That this is a true and correct copy of the original approved and signed by the Governor of the Commonwealth of Puerto Rico on May 5, 1977. As of date: April 5, 1978.

Appendix XII

COMMONWEALTH OF PUERTO RICO

SUPREME COURT

Office of the Secretary

San Juan, Puerto Rico

CLERK'S CERTIFICATE

I, Ernesto L. Chiesa, Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed documents are a true, exact, and official translation (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the letters of May 9, 1977, sent by the Secretary of the Treasury to Mr. Antero Solis Lazu, Mr. Luis S. Parrilla Castro, and Mrs. Judith Rodriguez de Quinones, members of the Board of Directors of the Cooperative Bank of Puerto Rico.

IN-WITNESS WHEREOF, at the request of the interested party, I issue these presents for official use, free of charge, under my hand and the seal of this Court, in San Juan, Puerto Rico, this 5th day of June 1979.

Ernesto L. Chiesa
Clerk
Supreme Court of
Puerto Rico

May 9, 1977

Mr. Antero Solis Lazu
Calle Juan J. Jimenez 514-B
Urb. Parque Central
Hato Rey, Puerto Rico

Sir:

By virtue of the authority vested in me by Article 18A of Act No. 88 of June 21, 1966, as amended, the Law of the Cooperative Bank of Puerto Rico, I hereby remove you from your position as a member of the Board of Directors of the Cooperative Bank of Puerto Rico for having participated in acts that are contrary to sound banking practices and for having participated in omissions or practices constituting a violation of your fiduciary duty as a director, as a result of which the Bank has sustained a substantial financial loss.

This removal shall take effect upon your receipt of this communication.

Very truly yours,

/s/ Julio Cesar Perez
Secretary of the
Treasury

May 9, 1977

Mr. Luis S. Parrilla Castro
Calle 429, Blg. 156 #6
Urb. Villa Carolina
Carolina, Puerto Rico

Sir:

By virtue of the authority vested in me by Article 18A of Act No. 88 of June 21, 1966, as amended, the Law of the Cooperative Bank of Puerto Rico, I hereby remove you from your position as a member of the Board of Directors of the Cooperative Bank of Puerto Rico for having participated in acts that are contrary to sound banking practices and for having participated in omissions or practices constituting a violation of your fiduciary duty as a director, as a result of which the Bank has sustained a substantial financial loss.

This removal shall take effect upon your receipt of this communication.

Very truly yours,

/s/ Julio Cesar Perez
Secretary of the Treasury

May 9, 1977

Mrs. Judith Rodriquez de Quinones
Calle Rosich No. 13
Ponce, Puerto Rico

Madam:

By virtue of the authority vested in me by Article 18A of Act No. 88 of June 21, 1966, as amended, the Law of the Cooperative Bank of Puerto Rico, I hereby remove you from your position as a member of the Board of Directors of the Cooperative Bank of Puerto Rico for having participated in acts that are contrary to sound banking practices and for having participated in omissions or practices constituting a violation of your fiduciary duty as a director, as a result of which the Bank has sustained a substantial financial loss.

This removal shall take effect upon your receipt of this communication.

Very truly yours,

/s/ Julio Cesar Perez
Secretary of the Treasury

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1863

HON. JULIO CESAR PEREZ, Secretary of the Treasury of the Commonwealth of Puerto Rico, et al

Petitoners,

v.

JUDITH RODRIGUEZ DE QUINONEZ, LUIS S. PARRILLA AND ANTERO SOLIS LAZU

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

A.J. AMADEO MURGA
Atty. for Plaintiffs
1105 Banco Popular
CenterHato Rey, Puerto
Rico 00918

PRESS OF BYRON S. ADAMS, INC., WASHINGTON, D.C.

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IN THE

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the refusal of the First Circuit Court of Appeals to judicially notice a recently enacted statute of the Commonwealth of Puerto Rico because of the inexcusable neglect of counsel is such an important question to warrant review by certiorari.

2. Whether the holding of the First Circuit Court of Appeals to the effect that the due process rights of three bank directors were violated when they were removed by the Secretary of the Treasury of the Commonwealth of Puerto Rico without hearing for allegedly having participated in acts and omissions in violation of their fiduciary duties as a result of which the bank suffered substantial losses is in conflict with the applicable decisions of this Honorable Court.

STATEMENT OF FACTS

Banco Cooperativo de Puerto Rico organized under the terms of Law 88 of June 21st, 1966, approved by the Legislature of the Commonwealth of Puerto Rico, is owned by its shareholders and its affairs managed by a Board of Directors composed of twelve persons nine of which are elected for a term of years by the general assembly of the Bank's shareholders. Section 759, Title 7 L.P.R.A.

Respondents were three of the nine elected directors for a term of three years whose term had not expired when on May 9th, 1977, they were removed from their positions by the Secretary of the Treasury of the Commonwealth of Puerto Rico through a letter that accused them of having participated in acts that "are contrary to the sound banking practices and for having participated in omissions or practices constituting a violation of your fiduciary duty as a director, as a result of which the Bank has sustained a substantial financial loss". Petitioner's App. XII, p. 53a.

Of the twelve directors, only the three respondents and a fourth director, not a party to this action, were removed. The Secretary did not act against the rest

of the directors of the Bank. The Secretary appointed four new directors to substitute the removed ones.

Respondents did not receive any other statement except for the letter, particularizing the charges or reasons serving as a basis for their removal nor were they afforded a prior or subsequent hearing to contest its validity.

On May 2nd, 1977, the Governor of Puerto Rico, Carlos Romero Barcelo, had addressed the people of Puerto Rico through radio or television with reference to the economic situation for which both the Banco Obrero and Banco Cooperativo de Puerto Rico were going through. In his speech he stated, among other things:

> "I want to emphazise the fact that most of the people who owe money to the Banco Obrero and the Banco Cooperativo are simply debtors who have not incurred in any fault other than not having been able to pay or not paying. When I speak about those who have plundered these Banks, that is, those who have divested the workers and the cooperative movement of what rightfully belonged to them. I am referring to those individuals who due to their close relationship and economic or other ties with officials or some Director of the Bank; or because of his position in the Bank or his blood ties with persons in high government spheres; have used said influences and relationships to secure loans without a collateral or sufficient guarantee, and who used and disposed of said money belonging to the Bank as if it were their own." Appendix I

On May 5, four days prior to the date when respondents were actually removed, the statute upon which the Secretary of the Treasury acted to oust respondents was amended to substitute "or" for

"and" with respect to the causes for which a director could be removed thus phrasing the causes in the disjunctive.

The issue of the economic condition of the Banco Cooperativo, the speech of the Governor denouncing the scandal and the removal of respondents on May 9, 1977, received full display by the Puerto Rican press during the month of May, 1977. App. II

At the time of their removal, the Cooperative Bank had regulations in effect which provided for the removal or dismissal of directors for a number of reasons including the case in which such directors acted in any form prejudicial to the interests of the Bank. Said regulations provided for a hearing and appeal in case of a removal a director. When they were removed no charges were pending against them. App. II

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The decision of the Court of Appeals for the First Circuit has not decided any important state or territorial question in conflict with applicable state or territorial law; neither has so far departed from the accepted and usual judicial court proceedings to call for an exercise of this Honorable Court power of supervision; neither there are any other special and important reasons to warrant this Honorable Court to exercise its discretion in favor of granting the Petition.

2. The decision of the U.S. Circuit Court of Appeals is correct and in harmony with the applicable decisions of this Honorable Court.

ARGUMENT

A. The decision of the Court of Appeals for the First Circuit has not decided any important state or territorial question in conflict with applicable state or territorial law; neither has so far departed from the accepted and usual judicial court proceedings to call for an exercise of this Honorable Court power of supervision; neither there are any other special and important reasons to warrant this Honorable Court to exercise its discretion in favor of granting the Petition.

Petitioners' complaint to this Honorable Court is that Circuit Court of Appeals refused to consider a recently enacted amendment to the challenged statute that arguably could save its constitutionality on the grounds it was never brought to the attention of the Circuit Court until after the opinion and judgment of the Court issued on March 30th, 1979. Petitioners' position is that it was the duty of the Circuit Court to take judicial notice of the amended statute in spite of the fact that it was never brought to its attection and the Court had no way of acquainting itself with this statute except through the action of the parties.

We fail to see what important question this petition presents to warrant this Honorable Court to entertain it. The only questions presented are whether this Honorable Court should reverse the conclusion of the U.S. Circuit Court of Appeals as to the effect that there had been no excusable neglect on the part of petitioners in not acquainting the Court with a recently amended controlling statute and whether the First Circuit Court of Appeals was bound to take judicial notice of the amendment to the statute not brought to its attention in spite of the inexcusable neglect of

counsel. We consider that the U.S. Circuit Court of Appeals in its opinion on petition for rehearing was very explicit stating its reasons why it did not consider that there had been excusable neglect on the part of petitioners and why it would not agree to a reargument of the case to permit introduction of a recently amended statute. It is to be noted that it was not until after the judgment of March 30th, that petitioners brought to the attention of the Honorable Court the amended statute even though by their own admission, they had knowledge of it when they argued the case before the Honorable Circuit Court of Appeals on November 7, 1978.

To permit rehearings every time that because of some counsel neglect a provision of law not accesible to the reviewing court is not brought to its attention would really place an enormous burden and would otherwise clog the already heavy calendar of the reviewing courts who are pressed for time and resources. As the Circuit Court stated in its opinion:

> "We find it an intolerable imposition on our time and limited resources to grant a rehearing for hitherto undisclosed statute."

There are no important considerations or reasons that would warrant this Honorable Court to overrule the determination of the U.S. Circuit Court of Appeals with regard to the circumstances in which said Court will grant relief to a party from a judgment based on excusable neglect. On the contrary, the ruling of the Circuit Court in this regard is a sound one based on principles of judicial administration. See Spound v. Mohasco Industries Inc., 534 F.2d 404 (1976) Cert Den. 429 U.S. 886.

Petitioner's contention that even in spite of the fact of his counsel failure to cite the law, the Court was bound to take judicial notice of it irrespective of whether it was a recently amended statute not yet in the official reports and not in the English language, overlooks the hard fact that the Circuit Court was not dealing with a federal statute or any other state enacted in the English language readily available to the Court. The truth is that unless brought to its attention by the parties, the Court would never discover the amendment. Under those circumstances, it was not bound to take judicial notice of it. Under those circumstances, such recent amendment in the Spanish language should be treated as it were foreing law and regarded as a fact. 20 Am Juris Sec. 48, p. 73.

B. The decision of the U.S. Circuit Court of Appeals is correct and in accordance with the decision of this Honorable Court.

The Court stated in its opinion on rehearing that even under the amended statute it was a close question, giving the accompanied circumstances, whether there was not such a stigma as to give rise to the due process rights discussed in its opinion.

We have in our statement of facts added certain facts omitted by petitioners which reinforce the conclusion that even under the amended statute respondents were deprived of their due process rights.

The Court of Appeals in its initial opinion did not consider necessary to decide whether plaintiffs were denied a property interest in being deprived of a di-

rectorship in a bank without prior notice or hearing. The Court stated:

> "Section 768A may be opened to an interpretation, in line with that given in the ordinance in Bishop v. Woods, migating the existence of any fourteenth amendment interest in serving as a director, although three factors not present in Bishop v. Woods the existence of a specific term (three years), the exceptional grounds for removal (dishonesty), and the fact that the appointing authority (the shareholders) differs from the removing authority (the Seccretary)-point against such an interpretation. We do not pursue the matter further, however, because wholly apart from whether a directorship itself is an interest protected by the fourteenth amendment, we believe that adding the stigma of a discharge for dishonesty gives rise to such an interest." Petitioner's App. p. 4a

Our argument before the U.S. Circuit Court of Appeals had been that the Secretary of the Treasury could only remove respondents for cause. Section 768(a), Title 7 L.P.R.A. The Secretary of the Treasury did not appoint, select, or elect them to their positions. Neither paid for what they received for attending the meetings of the Board of Directors. Nor were these plaintiffs-appellants employees of the Commonwealth of Puerto Rico. We states in our brief before the First Circuit Court and repeat here that:

"In those circumstances the removal of plaintiffs-appellants from their positions as directors of the Bank is governed by the Constitutional principles spelled out in a series of cases starting with Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) and continuing with Bell v. Burson, 402 U.S. 535 (1971);

Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. Grant, 416 U.S. 600 (1974) and North Georgia Finishing Inc. v. Dichem Inc., 419 U.S. 601 (1975). They stand for the proposition that except in extraordinary circumstances before a person can be deprived of a property interest even in a temporary manner, due process demands some form of prior hearing appropriate to the nature of the case. The range of property interests protected is wide. Property for this purposes has the most ample meaning and includes what it may be considered "privileges". Bell v. Burson, 402 U.S. 539 (1971). The same constitutional restraint against the deprivation of property without minimal due process applies when the interest is liberty which even has a wider meaning than property. In Board of Regents v. Roth, 408 U.S. 564 (1971), the Supreme Court enumerated some of the things liberty means to the citizens which are protected by the Due Process Clause of the Constitution. There it said:

> 'While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed.' Page 572.

In the light of the definitions of property and liberty for the purpose of its meaning within the due process clause of the Constitution it does not occur to us how can it be questioned that the position as a director of a private bank which one has gained through election and from which one derives some economic benefit and the sense of participation in the affairs of the association of which one is a member is not a property or liberty interest of enough stature to warrant constitutional protection. See Feinberg v.Federal Deposit Insurance Corporation, 522 F.2d 1335 (1975) and Feinberg v. Federal Deposit Insurance Corp., 420 Supp. 109 (1976); Manges v. Camp, 474 F.2d 97 (1974). These cases are clear authority for the proposition that the interest of a director in his position as an elected director of a private institution merits careful constitutional protection."

Therefore, we submit that irrespective of the existence of any stigma attached to the removal, the decision of the U.S. Circuit Court of Appeals is correct on the grounds that respondents were denied of their property interests without prior notice or hearing in violation of the due process clause.

We contend further that despite the last minute amendment to the statute, the removal of respondents was consumated in a highly stigmatizing manner.

Firstly: The amendment to the statute eliminating the additional requirement of personal dishonesty to the violation of fiduciary duties that resulted in financial losses to the bank was only enacted four days prior to the removal of respondents. Therefore, they had been elected and had discharged their duties under a statute which only allowed removal if their violation of their fiduciary duties which caused damage to the bank was accompanied by personal dishonesty. Dismissing them for acts occurred before the statute was amended constituted a retroactive application of the statute. Unless the statute explicitly permitted such retroactive application or unless the removal was specific as to the fact that no personal dishonesty was charged, the letter had the clear implication of dishonesty.

Secondly: The manner in which they were removed which was preceded by a televised speech by the Governor of Puerto Rico, on May 2nd, 1977, to the effect that certain persons had used influences and relationships of directors or officials of the bank to secure loans without a collateral or sufficient guarantee seen in conjunction with the letter of dismissal which did not disclaim any personal dishonesty and expressly removed them for having participated in acts that are contrary to sound banking practices and for having participated in omissions or practices constituting a violation of their fiduciary duties as directors, as a result of which the bank had obtained substantial financial losses constitute a stigmatizing charge.

The only sensible interpretation to the letter of dismissal seen in its context is that the Secretary of the Treasury was removing the directors for having used their positions and influence as directors of the bank so that the directors' friends could obtain money from the bank without collateral causing the bank to loose a substantial amount of money. That the directors had violated their fiduciary duties to protect the assets of the bank that were entrusted to their management in that they preferred the interest of their friends to the interest of the bank.

This charge without more qualification imputes respondents with a breach of trust, conduct which is unethical or immoral irrespective of any label of personal dishonesty. Twin Lick Oil Co. v. Marbury, 91 U.S. 587 (1876); Farmers Bros. Co. v. Huddle Enterprises Inc., 366 F.2d 143 (1966).

It is a charge of a serious nature sufficient to come within the test and teachings of this Honorable Court. The test is whether in connection with the termination of an employment status the government employer makes a charge which might seriously damage the employee's standing and reputation in the community. Bishop v. Woods, 426 U.S. 341 (1976); Owen v. City of Independence, Missouri, 560 F.2d. 925 (1977), p. 935; Wisconsin v. Constantineau, 400 U.S. 433 (1971).

No one can seriously contend that the terms of the letter itself without more constituted statements that unless true, were defamatory and likely to damage respondents standing and reputation in the community. If the surrounding circumstances are added, to wit: the speech of the Governor[1] and the fact that only respondents and another director were removed,

[1] We disagree with the Circuit Court of Appeals opinion stated in footnote 3 of p. 35 of petitioner's App. that respondents had not been stigmatized by the Governor's speech and that there is no nexus between the speech and the removal. By charging immorality and irresponsibility in the handling of the bank's fund and by alleging that some individual due to their close relationship and economic or other ties with some official or director of the bank obtained money without collateral seen in conjunction with removal of the 4 directors and not the whole Board, respondents were being identified and related to the causes that brought economic distress to the Bank. See Owen v. City of Independence, Missouri, 560 F.2d. 925 (1977)

it is clear that the stigma was amply abundant in the dismissal irrespective whether by the amendment the charge of personal dishonesty was not necessary included in the letter of dismissal.

CONCLUSION

For all the foregoing reasons it is respectfully requested that the petition of certiorari by petitioner be denied.

In San Juan, Puerto Rico, this 7th day of September, 1979

A. J. AMADEO MURGA
1105 Banco Popular Center
Hato Rey, Puerto Rico 00918
753-0875, 764-5436

CERTIFICATE OF SERVICE

IT IS CERTIFIED that a copy of the foregoing opposition was mailed to Hon. Hector A. Colon Cruz, Solicitor General of Puerto Rico, Box 192, San Juan, PR 00902., this 7 day of September, 1979.

A. J. AMADEO MURGA

APPENDIX

Appendix I

GOVERNOR'S SPECIAL ADDRESS

(Televised)—May 2, 1977

On June 14, 1960, our Legislature approved a Law which encompassed and turned into reality the dreams of a great Puerto Rican. Law number 86, which created the first banking institution to the service of our working class, known as "Banco Obrero", pursued the noble purpose of: "Promoting the welfare of the Puerto Rican workers by means of a regular systematic saving habit that would enable them to use the money saved to satisfy their legitimate credit needs".

Six years later, Monday June 21, 1966, the Legislature approved Law number 88 creating the "Banco de Cooperativas". This bank represented another hopeful effort of our people, who were desperately searching for avenues through which they could channel their determination to face and overcome their economic limitations.

Tonight, I have the sad but unavoidable responsibility to announce to the people of Puerto Rico that those efforts and those intentions have been irresponsibly ivalidated and frustrated to such a point that these institutions, of such high human and social value, have been left in such precarious economic conditions that only the concentrated effort of all of us who have the responsibility to govern this Island will make it possible to overcome the serious economic situtation confronting the Banco Obrero and the Banco de Cooperativas.

Thousands of Puerto Rican workers have their savings in the "Banco Obrero". Savings that represent their hopes for a better future. A future that involves the destiny of their children; whom they want to save from the economic difficulties and anxieties which they suffered. These are thousand of workers who cannot lose everything they have achieved through their sacrifice, dedication, and hope.

We cannot allow this to happen, and do not intend to let it happen without first having exhausted all the means within our reach to try and save, to the extent of our possibilities, an institution that has such an important function in our society. Regardless of whatever setbacks we may have to confront, regardless of the steps we may have to take; I assure you that those thousands of Puerto Rican workers will not be deprived of the desposits and of their share in the Bank's stock which rightfully and honestly belongs to them. The Secretary of Labor and the President of the Government Development Bank are members of the Board of Directors as stated by the Law. Therefore, the Government of Puerto Rico has at least a moral responsibility to these workers who trusted that their economic interests were being well protected.

The "Banco de Cooperativas" is in a similar situation, with the same consequences. The report we have received reveals, among other things, that the Island's cooperative movement has withdrawn its support; a fact that has created problems to increase the Bank's deposits.

Official reports sent by the Secretary of the Treasury reveal a situation of deep professional unconcern in the handling of the funds of these two banks over the last years. After examining the records and after having become aware of the degree of irresponsibility; of the immorality that has surrounded the handling of these bank's funds, I have emotionally gone through a state of surprise to a degree of displeasure. From a degree of displeasure to anger; and from anger to indignation. And when all my capacity of indignation was surpassed, I have emotionally passed on to a state of sorrow and shame, which is what I honestly and frankly feel now.

Sorrow and shame in having to accept that our cherished tradition of honesty has been shattered. A tradition estabeed and affirmed by public men and women from past generations who, regardless of so much adversity and poverty, knew how to teach us that there can be honesty

within poverty and dignity within despair. The fact that one of the most cherished traditions of our people has been seriously weakened, is worry enough to make the sensible men and women in our society feel the anguish of sorrow and shame.

The pertinent authorities will be in charge of informing and explaining to you how a small group of people, interrelated and blinded by the ambition of economic power, were able to establish a highly questionable banking operations center, to turn the banks of the poor into the personal moneyboxes of a fistful of adventurers with boundless desires to obtain riches.

I can tell you now that four people, among them three ex-presidentes of the Banco Obrero, at a given moment took loans for amounts which represented 93 percent of the Bank's capital.

While analizing this incredible situation, we must remember that the Banco Obrero was created to help the workers and not to serve as an instrument of personal profit to a number of privileged individuals. The sequence of outrageous actions includes loans granted without collateral or without acceptable guarantees. Exchange of guarantees by persons who were part of this small group. Absolute disregard of obligations contracted. The granting of new loans on already matured and *unpaid* loans. A whole series of irresponsibilities difficult to believe and impossible to accept. Today, and during previous days, the Banco Obrero has filed complaints for the collection of monies amounting to more than four million dollars against seven persons. Six of these persons owe a lot more, and new complaints will be filed against them within a few days. What is serious about these cases is not what they owe, since Puerto Rico has been going through an economic crisis. What is really serious is the lack of collateral or sufficient guarantee in the granting of these loans to persons who had some kind of relationship between them-

selves or who possesed great influence in high government spheres.

In the case of the Banco de Cooperativas, even though the group is smaller, the situation has the same voraciousness we have already pointed out. In this case there was one person who thought that the bank was "his bank" in the selfish and immoral sense of the phrase.

I always count on you all, I rely on the patriotic support that this country knows how to generate like no other country when it comes to saving its institutions. I count on it now, as I have done in the past, so that added to the determination of this Administration to save these two institutions, we may be able to save the interests of the workers and of the cooperative movement.

We must not overlook the fact that situations such as this ones are brought about when the forces that rule a country are left aimless and without definite plans for the future. When the ruling class of a country is composed of a self-serving group of individuals and participation is denied to representatives of all the existing sectors, the power established in this vacuum degenerates into situations such as the one we actually confront.

To undermine the confidence in our institutions is the most dangerous attempt that can be made against any society. And this is precisely the result of what has been done. There can be no hesitation in our intent to rescue this confidence. I can assure you that penal actions will be taken against those who with due criminal intention, individually or collectively, through their own personal initiative or by means of a conspiracy have seriously endangered these two institutions.

I want to emphasize the fact that most of the people who owe money to the Banco Obrero and the Banco de Cooperativas are simply debtors who have not incurred in any fault other than not having been able to pay or not

paying. When I speak about those who have plundered these Banks, that is, those who have divested the workers and the cooperative movement of what rightfully belonged to them, I am refering to those individuals who due to their close relationship and economic or other ties with officials or some Director of the Bank; or because of his position in the Bank or his blood ties with persons in high government spheres; have used said influences and relationships to secure loans without a collateral or sufficient guarantee, and who used and disposed of said money belonging to the Bank as if it were their own.

As the first step in our determinationto make the Banco Obrero and the Banco de Cooperativas stand on their feet again, I have sent three Bills to the Legislature to be considered within the urgency demanded by the situation. The first two bills carry the intention of empowering the Secretary of the Treasury with the necessary authority that will permit him to make use of additional legal mechanisms directed to strengthen and to make these institutions stand solidly on their feet again.

By means of this legislation, the Secretary of the Treasury would be empowered to substitute any Director in both banks according to his judgement and for the period of time he may deem convenient to insure a healthy and safe conduct within both institutions.

The other Bill provides the Secretary of the Treasury with the necessary authority to purchase classified assets of the Banco Obrero and the Banco de Cooperativas, and to allot the amount of sixty million dollars ($60,000,000.00) to finance their purchase. In other words, this means that with the express purpose of guaranteeing that both the Banco Obrero and the Banco de Cooperativas will continue to operate and thus serve the purpose for which they were created—which is no other than to be of service to the workers and the cooperative movement—we are assigning sixty million dollars to purchase these bad loans made by

both banks. Then the government will proceed to sell these loans at a discount or to collect them.

This shot of liquid funds will be enough to return the necessary economic strength to these banks, which should provide confidence to the depositors and to the people in general.

With these three bills as well as with other administrative measures it may be deemed necessary to take, we begin to act on our determination to confront this situation in a way worthy of the public responsibility you have delegated on me.

I wish right now to make a clear, open and sincere call to Puerto Rico's working class. These are institutions mainly dedicated to serve you. They are the product of long years of struggle by countless humble and very determined leaders of the labor movement. These two banking organizations are the fulfilment of dreams that many years ago in our history seemed to be impossible. They both have the sentimental value of countless sacrifices and of the unselfishness of many individuals who did not give in to the inhuman preassures imposed upon them by a privileged class. Neither imprisonment nor persecution; nor the hunger to which they were submitted succeeded in affecting the iron-like decision of those men. It is in their name that I am making this call. In their memory we must join forces so that the product of their struggles will not be undermined. It will be your determination as workers what will help to single out those who were and are true leaders of the labor and cooperative movements from those who have been using their leadership titles in both fields for self-serving personal, economic, and political purposes.

Together with this attitude of determination and of support to these institutions that I am asking of you, I am placing the already outlined decision taken by this Administration, which will never allow thousands of workers and members of the cooperatives to be divested of the savings

they have managed to raise with the sweat of their honest labor. Let us all help; particulary the workers, the leaders of the labor movement, the unions, the cooperatives and the public in general to maintain our faith and confidence in these banks which we want to strengthen and for which purpose we are asking the legislature to authorize us to invest sixty million dollars.

If there had been enough moral responsibility among other men in the government, Puerto Rico would not be going through this sad experience. If there had been a clear concept of what it means to direct a country, neither friends, relatives, nor nor political supporters would have been allowed to perpetrate this assault on two institutions to the service of our humble and simple people.

I ask of all the members of our Legislative Chambers, that within the frame of deliberation which corresponds to each one, they must proceed as quickly as circumstances demand. I have reasons to think that I will not be dissapointed.

To my people, I exhort you to a quiet meditation, to pass a calm judgement that will benefit future generations, which after all is the ultimate purpose of all our struggles. I want the people to know that we stand upright and will continue to do so, and that as I said before, and as I will always say: I COUNT ON YOU.

Appendix II

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 77-908

JUDITH RODRIGUEZ QUINONEZ, LUIS S. PARRILLA AND ANTERO SOLIS LAZU,

Plaintiff,

v.

HONORABLE JULIO CESAR PEREZ officially as Secretary of the Treasury of the Commonwealth of Puerto Rico, ARTURO TORREGROSA, AIDA PEREZ, ADALBERTO ORTIZ, CARLOS FIGUEROA,

Defendants.

ADDITIONAL STIPULATED FACTS

TO THE HONORABLE COURT:

COME the parties to the present case represented by the undersigned counsel and respectfully submit the following additional stipulated facts:

1. That in the local press of the Commonwealth of Puerto Rico the following newspaper artciles appeared on the dates hereinafter indicated:

1). Ell Dia, May 3, 1977, "They loaned money without collateral"

2). El Vocero, May 3, 1977, "CRB denounces tremendous scandal"

3). El Vocero, May 4, 1977, Page 15, Editorial "Integrity and honesty"

4). El Mundo May 4, 1977, Page 16A, "Leader MOU Pedro Grant ask that guilty be brought to trial relative irregularities in Banks"

5). El Mundo May 4, 1977 16A, "Berrios asks Governor to submit evidence of his grave accusations"

6). The San Juan Star, Editoria "A plea for Reason"

7). El Dia, May 9, 1977, 1977, "Jail is demanded for those who robbed the Cooperative Bank"

8). Advertisement by Julio Cesar Perez, May 16, 1977, naming Adalberto Ortiz, Aida Perez Gonzalez, Carlos Figueroa and Arturo Torregrosa in lieu of plaintiffs.

9). El Dia, May 11, 1977, "Removed four Directors of Banco Cooperativo"

10). El Mundo, May 17, 1977, Editoria "Hearings on the Bank"

11). El Mundo, May 13, 1977, "Two Board of Directors to be named today relative two Banks"

12). El Vocero, May 17, 1977 "District Attorney will investigate scandal in banks"

13). The San Juan Star, May 17, 1977 "The Bank Scandal", Page 15, J.M. Garcia Passalcqua.

14). The San Juan Star, May 23, 1977, "Coops League opposes choice for Bank Board"

15). El Mundo, May 26,1977, "Secretary of the Treasury asked that he should withdraw appointees for the Board of Directors of the Bank"

16). The San Juan Star, May 11, 1977, "Romero says firing of Obrero Board was unavoidable"

2. That on March 9, 1977 the Banco Cooperativo had the following regulations in effect:

> "10.8(g) None of the directors as such shall have a right to a salary but the board may from time to time set a fixed sum as compensation for the attendance of board meetings of any authorized committee. The board can also authorize payment for compensation which it considers reasonable for any and all of its members for services rendered to the Board that are not for the assistance to the meeting to the board of directors or such committees.
>
> 13.00 Removal of Directors, delegates and members of Committee.
>
> 13.01 Causes: The Board of Directors may by the vote of two-thirds, remove or dismiss a director, a delegate or a member of a committee for the following reasons:
>
> A. for failing to attend three meetings without justified cause;
> B. If such director acts in any form prejudicial to the interest of the bank;
> C. If he is physically or mentally incapacitated to discharge the duties of his position; *

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* d) If he should have any direct or indirect economic interest in any enterprise whose business is in competition with the business of the bank.

e) If he does not discharge the dispositions in posed to him by law and this regulations.

> 13.02 Hearing and appeal (part of the regulation) Before said removal may be effective, the Board shall offer the affected an opportunity of reasonable nature to defend in an extraordinary meeting called for this purpose 3."

3. That plaintiffs have not been the subject of any action by the Board of Directors to remove them from their position of Directors of the Bank.

NOTE: Attorney for the Defendants admits that the newspaper articles were published by the above mentioned newspapers on the day therein indicated, but does not admit the truth of the articles. Also, attorney for the defendants reserves the objection as to the admissibility of said articles on the ground of materiality and pertinency to the matters in issue.

4. That directors received $25.00 per diem for each day attendance to the meetings of the Board of Directors, plus travelling expenses to and from said meetings.

In San Juan, Puerto Rico, this 17 day of November, 1977.

/s/ A.J. AMADEO MURGA
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